No. 15-1509	
Title:	**U.S. Bank National Association, Trustee, By and Through CWCapital Asset Management LLC, Petitioner** **v.** **The Village at Lakeridge, LLC**
Docketed:	June 15, 2016
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(13-60038, 13-60039)
Decision Date:	February 8, 2016
Rehearing Denied:	March 16, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 13 2016	Petition for a writ of certiorari filed. (Response due July 15, 2016)
Jul 12 2016	Order extending time to file response to petition to and including August 15, 2016, for all respondents.
Aug 15 2016	Brief of respondent The Village at Lakeridge, LLC in opposition filed.
Aug 31 2016	DISTRIBUTED for Conference of September 26, 2016.
Oct 03 2016	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
Feb 13 2017	Brief amicus curiae of United States filed.
Feb 28 2017	Reply of petitioner U.S. Bank National Association, Trustee, et al. filed.
Mar 01 2017	DISTRIBUTED for Conference of March 17, 2017.
Mar 20 2017	DISTRIBUTED for Conference of March 24, 2017.
Mar 27 2017	Petition GRANTED limited to Question 2 presented by the petition.

Apr 21 2017	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 12, 2017.
Apr 21 2017	The time to file respondents' brief on the merits is extended to and including August 11, 2017.
Jun 12 2017	Joint appendix filed.
Jun 12 2017	Brief of petitioner U.S. Bank National Association, Trustee, et al. filed.
Aug 11 2017	Brief of respondent The Village at Lakeridge, LLC filed.
Aug 18 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 18 2017	Brief amicus curiae of the United States filed.
Aug 31 2017	SET FOR ARGUMENT on Tuesday, October 31, 2017.
Sep 07 2017	CIRCULATED
Sep 11 2017	Reply of petitioners U.S. Bank National Association, Trustee, et al. filed. (Distributed)
Sep 12 2017	Record requested from the U.S.C.A. 9th Circuit.
Sep 25 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 31 2017	Argued. For petitioners: Gregory A. Cross, Baltimore, Md. For respondents: Daniel L. Geyser, Dallas, Tex.; and Morgan Goodspeed, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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RECORD AND BRIEFS

15-1509

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, *ET AL.*, BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC, AND ROBERT ALAN RABKIN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Bankruptcy courts can only confirm a chapter 11 plan of reorganization over a secured creditor's objection if at least one impaired, consenting class of creditors votes to accept the plan (excluding the votes of insiders). 11 U.S.C. § 1129(a)(10). This is known as "cramdown."

This case presents the following questions:

1. Whether an assignee of an insider claim acquires the original claimant's insider status, such that his or her vote to confirm a cramdown plan cannot be counted under 11 U.S.C. § 1129(a)(10);

2. Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or the clearly erroneous standard of review adopted for the first time by the Ninth Circuit Court of Appeal in this action; and

3. Whether the proper test for determining non-statutory insider status requires bankruptcy courts to conduct an "arm's length" analysis as applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or to apply a "functional equivalent" test which looks to factors comparable to those enumerated for statutory insider classifications as erroneously applied for the first time by the Ninth Circuit Court of Appeal in this action.

PARTIES TO THE PROCEEDINGS BELOW

The following list provides the names of all parties to the proceedings below:

Petitioner, who was the Appellant below, is U.S. Bank National Association, As Trustee, As Successor-In-Interest To Bank Of America, N.A., As Trustee, As Successor By Merger To LaSalle Bank National Association, As Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), By And Through, CWCapital Asset Management LLC ("CWCAM"). CWCAM is a Special Servicer for the Trust.

Respondent, the debtor and Appellee below, is The Village at Lakeridge, LLC.

Robert Alan Rabkin, M.D. is a party-in-interest who purchased the $2.76 million insider claim for $5,000, but did not appeal the underlying orders or otherwise participate in these appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly-held entity owns 10% or more of the stock of U.S. Bancorp.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Background 3

A. Assignment of Insider Claim and Subsequent Vote to Accept Plan 3

B. Motion to Designate and Order Designating Rabkin as an Insider 3

C. Ninth Circuit Bankruptcy Appellate Panel's Decision 5

D. Ninth Circuit Court of Appeal's Decision 5

REASONS FOR GRANTING THE PETITION 7

I. Whether an Insider Claim Can be Transferred to a Third Party With the Purpose of Circumventing the Bankruptcy Code's Statutory Prohibition Against Insider Voting Under 11 U.S.C. § 1129(a)(10) Raises an Important Federal Question that Warrants this Court's Review 7

A. The Ninth Circuit's Ruling Permitting Debtors to Circumvent the Bankruptcy Code's Statutory Prohibition Against Insider Voting, Raises Questions of Exceptional Importance .9

B. The Ninth Circuit's Rejection of the General Law of Assignment in Bankruptcy Will More Broadly Impact Bankruptcy Cases Involving Claims Trading 14

II. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Correct Standard of Review for Determining Non-Statutory Insider Status, Which Will Impact Many Areas of Federal Bankruptcy and Fraudulent Conveyance Law..... 19

A This Case Presents an Ideal Vehicle to Resolve the Circuit Split 19

B The Question Presented Regarding the Standard of Review for Determining Non-Statutory Insider Status Impacts Many Areas of Bankruptcy Law Requiring Determinations of Insider Status 23

III. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Proper Test to be Employed to Determine Non-Statutory Insider Status..... 24

CONCLUSION..... 28

APPENDICES

Appendix A - Ninth Circuit Court of Appeals Opinion (February 8, 2015).

Appendix B - United States Bankruptcy Appellate Panel of the Ninth Circuit's Memorandum Decision (April 5, 2013).

Appendix C - Bankruptcy Court's Order Granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as an Insider Claim, or (B) Disallow Such Claim for Voting Purposes (August 20, 2012).

Appendix D - Ninth Circuit Court of Appeal's Order Denying Petition for Rehearing En Banc (March 16, 2016)

TABLE OF AUTHORITIES

Page(s)

Cases

In re 266 Washington Assocs.,
141 B.R. 275 (Bankr. E.D.N.Y. 1992) 13

In re A. Tarricone, Inc.,
286 B.R. 256 (Bankr. S.D.N.Y. 2002) 27

Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.),
531 F.3d 1272 (10th Cir. 2008) 20, 24, 25

In re Applegate Prop., Ltd.,
133 B.R. 827 (Bankr. W.D. Tex. 1991) 8, 13

Beal Bank U.S.A. v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC),
481 B.R. 51 (B.A.P. 9th Cir. 2012) 15

Boise Cascade Corp. v. U.S. E.P.A.,
942 F.2d 1427 (9th Cir. 1991) 12

Boyajian v. New Falls Corp. (In re Boyajian),
564 F.3d 1088 (9th Cir. 2009) 12, 15, 17

Browning Interests v. Allison (In re Holloway),
955 F.2d 1008 (5th Cir. 1992) 27

Castellani v. Kohne (In re Kurcharek),
79 B.R. 393 (E.D. Wis. 1987) 27

In re Curry,
160 B.R. 813 (Bankr. D. Minn. 1993) 27

In re Demko,
264 B.R. 404 (Bankr. W.D. Pa. 2001) 27

Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.),
379 B.R. 425 (S.D.N.Y. 2007) 15

In re Evergreen Energy, Inc.,
546 B.R. 549 (Bankr. D. Del. 2016) 24

Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.),
926 F.2d 1458 (5th Cir. 1991) 20

Goldie v. Cox,
130 F.2d 695 (8th Cir. 1942) 14

In re Heights Ban Corp.,
89 B.R. 795 (Bankr. S.D. Iowa 1988) 4, 8

In re Holly Knoll P'ship,
167 B.R. 381 (Bankr. E.D. Pa. 1994) 8, 13

Kaisha v. Dodson,
423 B.R. 888 (N.D. Cal. 2010) 27

In re KB Toys, Inc.,
736 F.3d 247 (3d Cir. 2013) ..... *passim*

Koch v. Rogers (In re Broumas),
Nos. 97-1183, 97-1182, 1998 WL 77842 (4th Cir. Feb. 24, 1996) 20

In re Krehl,
86 F.3d 737 (7th Cir. 1996) 20

In re Longview Aluminum, L.L.C.,
657 F.3d 507 (7th Cir. 2011) 19, 26

In re McIver,
177 B.R. 366 (Bankr. N.D. Fla. 1995) 27

In re Metiom, Inc.,
301 B.R. 634 (Bankr. S.D.N.Y. 2003) 18

Miami Police Relief & Pension Fund v. Tabas (In re The Florida Fund of Coral Gables, Ltd.), 144 Fed. Appx. 72 (11th Cir. 2005) 20

Murray v. Bammer (In re Bammer),
131 F.3d 788 (9th Cir. 1997) 21

In re O'Connell,
119 B.R. 311 (Bankr. N.D. Fla. 1990) 27

Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery,
330 F.3d 548 (3d Cir. 2003) (en banc) 12

Rupp v. United Sec. Bank (In re Kunz),
489 F.3d 1072 (10th Cir. 2007) 25

Schlumberger Res. Mgmt. Serv., Inc. v. CellNet Data Sys., Inc. (In re CellNet Data Sys., Inc.), 327 F.3d 242 (3d Cir. 2003) 19

Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns., Inc.),
554 F.3d 382 (3d Cir. 2009) 19, 24, 25

In re Standard Stores, Inc.,
124 B.R. 318 (Bankr. C.D. Cal. 1991) 27

Swarts v. Siegel,
117 F. 13 (8th Cir. 1902) 14

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.,
— U.S. —, 135 S. Ct. 831 (2015) 22

U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC),
814 F.3d 993 (9th Cir. 2016) ..... *passim*

The Village at Lakeridge. LLC v. U.S. Bank National Association (In re Village at Lakeridge. LLC),
BAP No. NV-12-1456, 2013 WL 1397447 (B.A.P. 9th Cir. Apr. 5, 2013) 1

Wake Forest Inc. v. Transamerica Title Ins. Co. (In re Greer West Inv. Ltd. P'ship),
81 F.3d 168, 1996 WL 134293 (9th Cir. Mar. 25, 1996) (unpublished) 4, 8

Ward v. Sun Valley Foods Co., Inc.,
212 Fed.Appx. 386 (6th Cir. 2006) 15

Weinman v. Walker (In re Adam Aircraft Indus., Inc.),
805 F.3d 888 (10th Cir. 2015) 25

Western Real Estate Equities, L.L.C. v. Village at Camp Bowie I, L.P. (In re Village at Camp Bowie I, L.P.), 710 F.3d 239 (5th Cir. 2013) 12

Statutes

11 U.S.C. § 101(31) 6, 12, 17, 20, 24, 25, 26

11 U.S.C. § 105(a) 3

11 U.S.C. § 502(d) 10, 15, 16

11 U.S.C. § 510(c) 15

11 U.S.C. § 523(a)(2)(B) 15, 16, 17

11 U.S.C. § 547 ..... 10, 23, 28

11 U.S.C. §§ 1126(e) 3, 12, 17

11 U.S.C. § 1129(a)(10) ..... *passim*

28 U.S.C. § 1254(1) 2

UNIF. FRAUDULENT TRANSFER ACT §§ 4(b) and 5(b) 23, 28

UNIF. VOIDABLE TRANSACTIONS ACT §§ 4(b) and 5(b) 23, 28

Other Authorities

FED. R. BANKR. P. 3001 13

H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 26

S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N 5787 26

SUP. CT. R. 29.6 ii

U.S. CONST. art. I, § 8, cl. 4 2

Weekly News & Comment, *9th Circuit Splits Over Non-Statutory Insiders*, 62 Bankr. Ct. Dec. News 4, Mar. 3, 2016 10

Marshall E. Tracht, Bankruptcy: *Close Personal Relationship Not Enough for Insider Status*, 45 REAL EST. L. REP. 3, Apr. 2016 10

Third Party Creditor Holding Claim Originally Owned by Debtor's Parent Entitiy May Vote for Cramdown Plan, Even Though Claim Was Purchased for Far Less than Full Value and Creditor Had Close Personal Relationship with Member of Parent's Board of Directors, Comm. Fin. News, Feb. 22, 2016 10

In re Village at Lakeridge, LLC: Ninth Circuit Clarifies Who is Considered Non-Statutory Insider, Thompson Reuters, Practical Law Bankruptcy (Mar. 25, 2016), http://us.practicallaw.com/w-001-4934 11

Chapter 11 Plan Process: Overview,
Thompson Reuters, Practical Law
Resources (2016) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner U.S. Bank National Association, et al., by and through CWCapital Asset Management, solely in its capacity as Special Servicer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A., *infra*, pp. 1a-27a) is reported as *U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016).

The opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit (App. B., *infra*, pp. 28a-60a) is not reported in the Bankruptcy Reporter, but is available at *The Village at Lakeridge. LLC v. U.S. Bank National Association (In re The Village at Lakeridge, LLC)*, BAP No. NV-12-1456, 2013 WL 1397447 (B.A.P. 9th Cir. Apr. 5, 2013).

The opinion of the United States Bankruptcy Court for the Central District of California granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as an Insider Claim, or (B) Disallow Such Claim for Voting Purposes (August 20, 2012) (App. C, *infra*, pp. 61a-70a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 2016. Petitioner filed a motion for *en banc* review on February 22, 2016, which was denied on March 16, 2016 (App. D, pp. 71a-73a).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the United States Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

Section 1129(a) of title 11 of the United States Code (the "Bankruptcy Code") provides in pertinent part that:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . .
>
> (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10).

STATEMENT OF THE CASE

I. Background

A. Assignment of Insider Claim and Subsequent Vote to Accept Plan

All of the facts on appeal are undisputed. This appeal arises from a single asset real estate bankruptcy case involving only two creditors. Petitioner is the senior secured creditor of The Village at Lakeridge, LLC ("Debtor" or "Respondent"), and the only prepetition creditor of the Debtor's bankruptcy estate. The other creditor is Robert Rabkin ("Rabkin"), the assignee who purchased a $2.76 million insider claim from his girlfriend (who is a member of the Debtor and its corporate designee) for $5,000 just days prior to the Debtor's disclosure statement hearing. The Debtor relied on Rabkin's single vote in an attempt to confirm the Debtor's First Amended Plan of Reorganization (the "Plan") over Petitioner's objection. It is undisputed that but for the assignment to Rabkin, the insider claim could not be voted to confirm the Plan under 11 U.S.C. § 1129(a)(10).

B. Motion to Designate and Order Designating Rabkin as an Insider

The Bankruptcy Court granted in part Petitioner's Motion to (a) Designate Claim of Robert Rabkin as an Insider Claim, or (b) Disallow Such Claim for Voting Purposes Pursuant to 11 U.S.C. §§ 1126(e), 1129(a) and 105(a) (the "Designation Motion"), holding that Rabkin's vote could not be considered to determine acceptance of the Plan under 11 U.S.C. § 1129(a)(10) because Rabkin assumed the original claimant's insider status when he acquired the insider claim. Accordingly, on August 20, 2012, the Bankruptcy Court entered an order granting the Designation Motion in part, holding that the Plan was not

confirmable because the Debtor did not have the consenting, impaired class necessary to confirm the Plan (the "Designation Order"). (App. C, pp. 67a-68a).

In making its ruling, the Bankruptcy Court applied the general law of assignment to preclude an assignee of an insider claim from voting to confirm a plan. (*Id.* at 68a). The Court followed, among other things, the rationale of the Ninth Circuit in an unpublished decision, which concluded that an assignee of an insider claim could not vote to accept a cramdown plan for purposes of 11 U.S.C. § 1129(a)(10) because the assignee acquired the original claimant's insider status:

> Were courts to allow purchasers of insider claims to approve Chapter 11 plans without any judicial scrutiny, "[d]ebtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties who in turn could vote to accept. This the court cannot permit."

Wake Forest Inc. v. Transamerica Title Ins. Co. (In re Greer West Inv. Ltd. P'ship), 81 F.3d 168, 1996 WL 134293, at *2 (9th Cir. Mar. 25, 1996) (unpublished) (quoting *In re Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988)). (*See* App. C, p. 68a).

The Debtor appealed the Designation Order, asserting that the Bankruptcy Court erred when it denied plan confirmation on the basis that Rabkin acquired the same status as a statutory insider when he purchased the insider claim. Petitioner filed a cross appeal from the portion of the Designation Order holding that Rabkin was not a non-statutory insider for purposes of Section 1129(a)(10), asserting that the Bankruptcy Court (a) applied the wrong legal

standard for determining non-statutory insider status, and (b) erroneously concluded that Rabkin was not a non-statutory insider despite Rabkin's romantic and business relationship with the Debtor's principal and corporate designee, and uncontroverted evidence showing that the assignment was not an arm's length transaction.

C. Ninth Circuit Bankruptcy Appellate Panel's Decision

On April 5, 2013, the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") reversed the Bankruptcy Court's holding that Rabkin's vote could not be considered to determine acceptance of the Plan, and affirmed the Bankruptcy Court's holding that Rabkin was not a non-statutory insider. (App. B, pp. 41a-50a).

On April 19, 2013, Petitioner filed a Notice of Appeal to the Ninth Circuit.

D. Ninth Circuit Court of Appeal's Decision

On February 9, 2016, the Ninth Circuit issued a published decision affirming the BAP's ruling on two legal grounds: First, the Ninth Circuit held that a third-party assignee of an insider claim could vote to confirm a cramdown plan even though the claim could not be voted in the hands of the original claimant. The Ninth Circuit held that the general law of assignment did not apply to the sale of insider claims because (a) insider status is not a "property of a claim," and (b) a person's insider status is "a question of fact that must be determined after the claim transfer occurs." *Village at Lakeridge*, 814 F.3d at 999-1000; (App. A., p. 10a). Second, in a 2-1 decision, the Panel majority applied a clearly erroneous standard of review for determining non-statutory insider status, and deferred to the Bankruptcy Court's application of only a few factors for determining non-statutory insider status without

regard to the "arm's length" test applied by the Third, Seventh and Tenth Circuit Courts of Appeal. *Id.* at 999-1000, 1002-03 & n.14, and 1006-07; (App. A, pp. 10a-11a, 15a-16a).

The Bankruptcy Court and the Panel majority declined to apply the "arm's length" test employed by other circuits, or address the following undisputed facts which had a bearing on whether the insider's assignment of the insider claim to Rabkin was an arm's length transaction: (a) Rabkin and Bartlett's close romantic and business relationship; (b) Bartlett's failure to shop the claim to anybody other than Rabkin; (c) Debtor's failure to serve Rabkin with any bankruptcy papers; (d) Rabkin's lack of knowledge about the bankruptcy case or the proposed treatment of the Insider Claim under the Plan; (e) Rabkin's failure to review the relevant documents including the Notice of Assignment of Claim, the Disclosure Statement, the Plan, the Schedules; (f) Rabkin's lack of knowledge as to whether the original claimant filed a Proof of Claim or notice of assignment; (g) Rabkin's lack of due diligence; and (h) Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan. As the dissent noted, the Bankruptcy Court did not even inquire whether the assignment was an arm's length transaction. *Id.* at 1005-06 (App A., p. 23a) (J. Clifton, dissenting).

The Panel majority also enunciated a new test for determining non-statutory insider status that looks to whether (i) the closeness of a creditor's relationship with a debtor "**is comparable to that of the enumerated insider classifications in § 101(31)**" and (ii) the "transaction is negotiated at less than arm's length." *Id.* at 1001 (emphasis added) (citation omitted); (App. A, p. 13a). In his dissent, Judge Clifton argued that

the Panel majority (a) improperly applied a clearly erroneous standard of review rather than the *de novo* standard of review applied by other Circuits, and (b) failed to apply the arm's length test employed by all other Circuits for determining non-statutory insider status as adopted by other circuits. *Id.* at 1006-07 (J. Clifton, dissenting); (App. A., pp. 23a-25a).

On February 22, 2016, Petitioner timely filed a Petition for Rehearing *En Banc*, which was denied on March 16, 2016. (App. D, p. 73a).

On March 22, 2016, Petitioner filed a motion to stay the mandate, which was granted on April 6, 2016.

REASONS FOR GRANTING THE PETITION

I. Whether an Insider Claim Can be Transferred to a Third Party With the Purpose of Circumventing the Bankruptcy Code's Statutory Prohibition Against Insider Voting Under 11 U.S.C. § 1129(a)(10) Raises an Important Federal Question that Warrants this Court's Review

One of the fundamental principles of bankruptcy law is that insider votes cannot be considered to confirm a cramdown plan over the objection of secured creditors. This statutory prohibition against insider voting is codified in 11 U.S.C. § 1129(a)(10).

The Bankruptcy Court, following overwhelming authority, correctly held that the vote of an assignee of an insider claim could not be considered to determine acceptance of the Plan by an impaired class of claims under 11 U.S.C. § 1129(a)(10) because an assignee of an insider claim acquired the same status as a

statutory insider. [1] Under the general law of assignment, which is recognized in bankruptcy cases, an assignee acquires the claim subject to all of its disabilities. Having found Rabkin to be a statutory insider as a result of his acquisition of the insider claim, the Bankruptcy Court denied confirmation because the Debtor did not have an impaired, consenting class absent Rabkin's vote.

The Ninth Circuit affirmed the BAP's reversal of the Bankruptcy Court's decision with very little analysis, concluding that the general law of assignment does not apply to the assignment of claims for purposes of 11 U.S.C. § 1129(a)(10), and that a person's insider status is a question of fact that must be determined after the claim transfer occurs. The Court noted that "bankruptcy law would contain a procedural inconsistency wherein a claim would retain its insider status when assigned from an insider to a non-insider, but would drop its non-insider status when assigned from a non-insider to an insider." (App. A, p. 11a) (citing *Applegate*, 133 B.R. at 833; *Holly Knoll*, 167 B.R. at 385). This rationale is inconsistent with the purpose of 11 U.S.C. § 1129(a)(10), which is to disqualify insider voting for purposes of plan confirmation. Under the general law of assignment, assignment of an insider claim, as occurred here, transfers the disability of insider status to the assignee. This doctrine comports with the legal

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[1] *See* App. C, pp. 67a-68a, ¶¶ 6 and 8 (citing *In re Holly Knoll P'ship*, 167 B.R. 381, 385 (Bankr. E.D. Pa 1994); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991); *In re Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988); and *Greer West, supra*, 81 F.3d 168, 1996 WL 134293, at *2).

principle of *"nemo dat qui non habet"* (no man gives that which he did not have).

The insider should not be able to evade the statutory prohibition against insider voting by simply assigning his or her claim. Yet, the Ninth Circuit's ruling effectively held that insider claims can be transmuted for voting purposes if transferred to friendly third parties.

A. The Ninth Circuit's Ruling Permitting Debtors to Circumvent the Bankruptcy Code's Statutory Prohibition Against Insider Voting Raises Questions of Exceptional Importance

The Opinion below raises questions of exceptional importance that extend to virtually every chapter 11 bankruptcy case where a debtor does not have sufficient votes to confirm a cramdown plan. The Opinion creates a judicial loophole to the statutory prohibition against insider voting. If the decision is not reversed, every debtor who would otherwise be unable to confirm a plan, absent the vote of a claim held by an insider, will be given a powerful weapon to game the system by assigning insider claims to friendly third parties for a nominal amount who will vote to accept a debtor's plan. As Judge Clifton noted in his dissent:

> [T]he majority opinion effectively renders that statutory requirement meaningless. Under the holding here, insiders are free to evade the requirement [of having at least one class of impaired creditors who has accepted the plan, "determined without including any acceptance of the plan by any insider"] simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a

> friendly third party, who can then cast the vote the insider could not have cast itself.

Village at Lakeridge, 814 F.3d at 1007 (J. Clifton, dissenting); (App. A, p. 26a).

Other legal scholars have noted the controversial nature of this decision. *See* Joel F. Newell, *Trading Claims to Shed Insider Status: Village at Lakeridge*, 1 Norton Bankr. L. Adviser 2, at 4–5 (2016) (noting that factual analyses will matter more in future cases as a result of the decision, opining that it is possible that the majority's opinion will widen the circuit split as to what constitutes impairment, and suggesting that the ruling may extend to other areas including claims disallowance and avoidance litigation under 11 U.S.C. §§ 502(d) and 547); Weekly News & Comment, *9th Circuit Splits Over Non-Statutory Insiders*, 62 Bankr. Ct. Dec. News 4, Mar. 3, 2016, at 1 (inquiring whether the Ninth Circuit "effectively negate[d]" 11 U.S.C. § 1129(a)(10)); Marshall E. Tracht, *Bankruptcy: Close Personal Relationship Not Enough for Insider Status*, 45 REAL EST. L. REP. 3, Apr. 2016, at 1 (noting that the protection against insider voting under the Bankruptcy Code has been called into question); Case Comment, *Third Party Creditor Holding Claim Originally Owned by Debtor's Parent Entity May Vote for Cramdown Plan, Even Though Claim Was Purchased for Far Less than Full Value and Creditor Had Close Personal Relationship with Member of Parent's Board of Directors*, Comm. Fin. News., Feb. 22, 2016, at 2 (casting doubt on the Ninth Circuit's rationale to permit assignees of insider to vote claims that could not be voted in the hands of the original claimant); *In re Village at Lakeridge, LLC.: Ninth Circuit Clarifies Who is Considered Non-Statutory*

Insider, Thompson Reuters, Practical Law Bankruptcy (Mar. 25, 2016), located at http://us.practicallaw.com/w-001-4934, p.3 (noting that the decision "circumvents or avoids the statutory requirements of section 1129(a)(10) of the Bankruptcy Code that at least one impaired class under the plan accepted the plan without counting ballots cast by insiders. Therefore the insider's vote is essentially preserved"); *Chapter 11 Plan Process: Overview*, Thompson Reuters, Practical Law Resource (2016), p. 20 (opining that the decision "may create an opportunity for debtors to avoid the statutory requirements of section 1129(a)(10) . . . .").

The Opinion does not address contrary authority recognizing the general law of assignment in bankruptcy (including conflicting case law in the Ninth Circuit), but concludes without analysis that "[b]ecause insider status is not a property of a claim, general assignment law . . . does not apply." *Village at Lakeridge*, 814 F.3d at 1000; (App. A., p. 10a). The Ninth Circuit's conclusion is neither supported by the statute, nor the legislative history or applicable case law.

Section 1129(a)(10) permits cramdown only if at least one impaired **class of claims** accepts the plan, determined "without including any acceptance of the plan by any insider." The phrase, "without including any acceptance of the plan by any insider" cannot be read in isolation, but must be read in the context of voting "claims" to give meaning to section 1129(a)(10) and the other provisions of the Bankruptcy Code. "[C]ourts must be mindful, particularly when examining the Bankruptcy Code, that statutory interpretation is 'a holistic endeavor.'" *In re KB Toys, Inc.*, 736 F.3d 247, 251 (3d Cir. 2013) (quoting *Official*

Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 559 (3d Cir. 2003) (en banc)). Thus, "courts 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Id.* (quoting *Cybergenics*, 330 F.3d at 559); *see also Village at Lakeridge*, 814 F.3d at 1007 (J. Clifton, dissenting); (App. A, p. 26a) (recognizing that the court "must 'interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.' *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). . . .").

Nothing contained in Sections 101(31), 1126(e) or 1129(a)(10) of the Bankruptcy Code indicates that Congress intended to abrogate the general law of assignments when determining whether a class of claims is impaired for purposes of plan confirmation.[2] **"In the absence of . . . specific language. . . Congress intended that the general law of assignment remains applicable."** *Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1091 (9th Cir. 2009) (emphasis added). In order to give meaning to the statutory prohibition against insider voting, an assignee of an insider claim must be prohibited from voting the claim without regard to whether the assignee is independently an insider. Otherwise, the claim in the hands of the assignee would be afforded

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[2] "[T]he scant legislative history on § 1129(a)(10) provides virtually no insight as to the provisions intended role. . . ." *Western Real Estate Equities, L.L.C. v. Village at Camp Bowie I, L.P. (In re Village at Camp Bowie I. L.P.)*, 710 F.3d 239, 246 (5th Cir. 2013) (citations omitted).

better treatment than in the hands of the original claimant. Section 1129(a) would be rendered meaningless if the insider status could be easily cleansed by simply assigning the insider claim.[3]

Neither the rationale in *Holly Knoll,* 167 B.R. at 385 nor *Applegate,* 133 B.R. at 833 are inconsistent with this conclusion. In both cases, the courts noted the applicability of general assignment law in bankruptcy cases, but recognized a narrow exception where the assignee's pre-existing status as a statutory insider could not be cleansed by acquiring a non-insider claim. In both cases, the courts were concerned about insider manipulation to evade the statutory prohibition against insider voting under section 1129(a)(10) by acquiring and voting non-insider claims. Neither case supports the Ninth Circuit's conclusion that general assignment law is inapplicable when an insider claim is assigned to a friendly third party who then votes the claim to facilitate an otherwise uncomfirmable cramdown plan. Insider status necessarily follows the insider claim to avoid granting an assignee greater rights than the claim had in the hands of the original claimant.

The prohibition against insider voting protects creditors from having to fight a cramdown plan premised on the acceptance by a class of creditors holding insider claims. *In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992). Unless

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[3] In the instant case, it is undisputed that absent the assignment, Rabkin had no claim to vote. In addition, bankruptcy law makes clear that the transfer of a claim constitutes a substitution, but does not transform the claim. *See* FED. R. BANKR. P. 3001.

certiorari is granted, exactly the opposite result will follow where virtually any debtor will be able to easily manufacture an impaired assenting class by simply assigning an insider claim to a friend.

An insider's ability to assign its claim to friendly third parties who could vote such claim renders meaningless the prohibition against insider voting, and will undoubtedly open the floodgates to bankruptcy filings in the Ninth Circuit and elsewhere by encouraging debtors to transfer insider claims merely to evade the statutory restriction against insider voting.

B. The Ninth Circuit's Rejection of the General Law of Assignment in Bankruptcy Will More Broadly Impact Bankruptcy Cases Involving Claims Trading

In addition to impacting the confirmability of chapter 11 plans premised upon the transfer (and subsequent vote) of insider claims, the Ninth Circuit's ruling casts a wider net under federal bankruptcy law, and can affect a creditor's liability in virtually all bankruptcy cases filed under chapters 7, 9, 11 and 13 for preferential transfers, fraudulent conveyances, disallowance or recharacterization of claims, and equitable subordination, among other things.

Numerous courts, including the Third, Sixth, Eighth and Ninth Circuit Courts of Appeal, have recognized the applicability of the general law of assignment in bankruptcy cases in various contexts including claims disallowance, subordination, and preferential transfers, among other things. *See, e.g., KB Toys*, 736 F.3d 247 (applying general assignment law to disallow claim under 11 U.S.C. § 502(d)); *Goldie v. Cox*, 130 F.2d 695, 720 (8th Cir. 1942) (in the context of claim disallowance, holding that "[a]n assignee

stands in the shoes of the assignor and subject to all equities against the assignor [and] [u]nless these claims. . . can be allowed to the claimant, the assignee would fare likewise") (citing *Fidelity Mut. Ins. Co. v. Clark*, 203 U.S. 64, 74, 27 S.Ct. 19, 51 L.Ed. 91 (1906)); *Swarts v. Siegel*, 117 F. 13, 15 (8th Cir. 1902) (holding in the context of claim subrogation under section 57i of the Bankruptcy Act of 1898 (which preceded 11 U.S.C. § 502(d)) that "one who holds the rights or claims of another by subrogation takes them subject to the limitations and disqualifications attached to them in the hands of his predecessor. He has no higher or better rights than those which the first holder possessed. . . ."); *Boyajian*, 564 F.3d at 1091 (applying general assignment law in nondischargeability action under 11 U.S.C. § 523(a)(2)(B)); *Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.)*, 379 B.R. 425, 435-36 (S.D.N.Y. 2007) (recognizing the applicability of general assignment law in the context of equitable subordination under 11 U.S.C. § 510(c) and disallowance under 11 U.S.C. § 502(d)); *Ward v. Sun Valley Foods Co., Inc.*, 212 Fed. Appx. 386, 391 (6th Cir. 2006) (unpublished) (denying successor attorney's application for attorney's fees and costs incurred by predecessor law firm, which were assigned to attorney, because predecessor law firm agreed to waive collection of such fees as part of a settlement of a malpractice action, concluding that "it is a fundamental rule of the law of contract that the assignee stands in the shoes of the assignor, possessing the same rights and remaining subject to the same defenses as the assignor") (citation omitted); *Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 481 B.R. 51, 65–66 (B.A.P. 9th Cir. 2012) (denying motion of claims purchaser to change vote in order to block

confirmation of a cramdown plan, reasoning that "allowing an assignee-creditor to change the vote previously cast by the assignor undermines a basic principle of assignments.'").

The Ninth Circuit's refusal to apply general assignment law for purposes of plan voting conflicts with circuit court opinions applying general assignment law to other provisions of the Bankruptcy Code. The Third Circuit, for example, has held that when the recipient of a preferential transfer assigns his claim to a third party, the claim must nevertheless be disallowed under section 502(d) of the Bankruptcy Code even though the assignee itself did not receive a preferential transfer:

> If the original claimant could transfer the claim for value to a transferee, the original claimant would receive value for a claim that would otherwise be disallowed and the transferee, who would receive the claim "washed" of its disability, could then share in the distribution of estate assets. . . .

KB Toys, 736 F.3d at 252.

The Ninth Circuit similarly applied general assignment law to a nondischargeability action commenced by an assignee under Section 523(a)(2)(B). Section 523(a)(2)(B) provides that a discharge does not discharge an individual debtor from any debts for money, property, services or credit obtained by the use of a materially false statement in writing on which "the creditor to whom the debtor **is liable** for such money, property, services, or credit reasonably relied . . . ." 11 U.S.C. § 523(a)(2)(B) (emphasis added). The Ninth Circuit held that the assignee of a claim that was based on the debtor's false financial

statements could bring a nondischargeability action even though the assignee did not itself reasonably rely on the debtor's material false statements when it purchased the claim. *Boyajian*, 564 F.3d at 1091. As the Ninth Circuit noted:

> Congress was undoubtedly aware that under general principles of assignment law an assignee steps into the shoes of the assignor. **Had Congress wished for assigned debts to be treated differently under § 523(a)(2)(B), it would have done more than rely on the word "is" in subsection (iii). In the absence of . . . specific language, we believe that Congress intended that the general law of assignment remains applicable.** That is, assuming [the assignee] was indeed the recipient of a general assignment of the original judgment, it can stand in the shoes of its assignor and pursue a nondischargeability action under § 523(a)(2)(B).

Id. (emphasis added).

In the instant case, the Panel did not address why the general law of assignment applied in *Boyajian* or in *KB Toys,* but should be disregarded in this case. Nothing contained in Sections 101(31), 1126(e), 1129(a)(10) or any other provision of the Bankruptcy Code indicates that Congress intended to abrogate the general law of assignment when determining what constitutes an insider claim for purposes of plan confirmation. Absent specific language to the contrary, Congress intended the general law of assignment to apply. *Boyajian*, 564 F.3d at 1091

There is no legitimate policy reason for granting assignees greater rights than the original claimants in bankruptcy. Unlike trade creditors, assignees are not involuntary creditors who may often lack the ability to know that they were transacting business with an insolvent entity. "[C]laim purchasers, however, are entities who knowingly and voluntarily enter the bankruptcy process . . . . [A] purchaser should know that it is taking on the risks . . . attendant to the bankruptcy process . . . . [A] claim purchaser's opportunity to profit is partly created by the risks inherent in bankruptcy. Disallowance of a claim . . . is among these risks . . . ." *KB Toys*, 736 F.3d at 255. *See also In re Metiom, Inc.*, 301 B.R. 634, 642-43 (Bankr. S.D.N.Y. 2003) ("[T]he assignment should not, and does not, affect the debtor's rights vis-a-vis the claim; **it is incumbent, instead, on the prospective assignees to take into account possible claim defenses when they negotiate the terms of their assignments.**") (Emphasis added).

In sum, the Ninth Circuit's decision, if left undisturbed, creates a troubling precedent. Chapter 11 debtors that have no hope of confirming a plan due to the lack of an impaired, consenting class will be motivated to assign their insider claims to third parties as a way to "game" the system and circumvent the statutory prohibition against voting insider claims. While the Panel majority noted that bankruptcy courts can still deny plan confirmation if a plan is not proposed in good faith, or fails to comply with other provisions of the Bankruptcy Code (App., Ex. A, p. 12a), these are different and independent grounds for denial of plan confirmation. The Bankruptcy Code does not recognize an exception that would cleanse insider status by simply assigning an insider claim to third parties. Creditors should not

have to rely upon an adjudication of factual issues to determine whether the assignment of an insider claim and subsequent vote by the assignee in favor of a cramdown plan, was proposed in bad faith, or whether the plan complies with other provisions of the Bankruptcy Code.

II. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Correct Standard of Review for Determining Non-Statutory Insider Status, Which Will Impact Many Areas of Federal Bankruptcy and Fraudulent Conveyance Law

Supreme Court review is also necessary to resolve a split among the circuits concerning the proper standard of review for determining non-statutory insider status.

A. This Case Presents an Ideal Vehicle to Resolve the Circuit Split

The Panel majority's review of the Bankruptcy Court's determination of non-statutory insider status for clear error directly conflicts with the standard of review employed by the majority of circuit courts in the Third, Seventh, Tenth and Eleventh Circuits, which hold that questions of insider status are mixed questions of law and fact to be reviewed *de novo*. *See Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns., Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009) (recognizing circuit split, but concluding that the issue of insider status "is best characterized as a mixed question of law and fact" and exercising "'plenary review of the lower court's interpretation and application of those facts to legal precepts'") (citing *Schlumberger Res. Mgmt. Serv., Inc. v. CellNet Data Sys., Inc. (In re CellNet Data Sys., Inc.)*, 327 F.3d 242, 244 (3d Cir. 2003) (other citations omitted)); *In re*

Longview Aluminum. L.L.C., 657 F.3d 507, 509 (7th Cir. 2011) ("The question of insider status is regarded as a mixed question of law and fact" to be reviewed de novo) (citations omitted); *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996) (recognizing that the "standard of review to be applied to a bankruptcy judge's findings on insider status has been the subject of some debate", but concluding that "the question is properly characterized as a mixed question of law and fact") (citations omitted); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1275 (10th Cir. 2008) (same); *Miami Police Relief & Pension Fund v. Tabas (In re The Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005) (unpublished) ("We agree with the Seventh and Fifth Circuits that '[t]he question under section 101(31) is whether the historical facts found by the bankruptcy court meet the [Bankruptcy] Code's open-ended definition of an insider. We think that question is properly characterized as a mixed question of law and fact.'") (citing *Krehl*, 86 F.3d at 742). But *see Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464, 1466 (5th Cir. 1991) (acknowledging that "when a finding of fact is premised on an improper legal standard, that finding loses the insulation of the clearly erroneous rule", but later stating that "[a] determination of insider status is a question of fact and . . . subject to the clearly erroneous standard of review"); *Koch v. Rogers (In re Broumas)*, Nos. 97-1183, 97-1182,1998 WL 77842, at *8 (4th Cir. Feb. 24, 1996) (unpublished) (finding that the bankruptcy court's determination of insider status was not clearly erroneous considering the transferee's relationship with the transferor as including "creditor and debtor, principal and agent, joint venturers, attorney and client, landlord and tenant, and close friends").

As Judge Clifton noted in his dissent, "the problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied."

> What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by the parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to *de novo* review. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.")

Village at Lakeridge, 814 F.3d at 1006; (App. A, p. 24a).

Based on the Panel majority's improper application of the clearly erroneous standard of review, the Panel majority afforded complete deference to the Bankruptcy Court's findings.[4] Had it

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[4] As Judge Clifton urged in his dissent, the Panel majority should have considered the Bankruptcy Court's failure to refer to an "'arm's length transaction' as well as its failure to provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers." *Id.* Because the Panel gave improper deference to the Bankruptcy

not done so, the Panel majority implicitly acknowledged that they would have joined Judge Clifton in in finding that Rabkin was a non-statutory insider. *Id.* at 1002-03 & n. 14; (App. A, pp. 15a-16a & n. 14).

This Court has previously granted certiorari to resolve circuit splits involving the applicable standard of review. For example, in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, — U.S. —, 135 S. Ct. 831 (2015), the Court recently described the issue on review as "requir[ing] us to determine what standard the Court of Appeals should use when it reviews a trial judge's resolution of a underlying factual dispute." *Id.* at 835. The Court considered whether "the Court of Appeals [should] review the district court's findings *de novo* as it would review a question of law? Or, should it review that factfinding as it would review a trial judge's factfinding in other cases, namely by taking them as correct 'unless clearly erroneous?'" *Id.*

Court's findings, it declined to consider undisputed facts having a bearing on the lack of an arm's length transaction including Rabkin and Bartlett's close romantic and business relationship, Bartlett's failure to shop the claim to anybody other than Rabkin, and Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan, among other things. After considering these undisputed facts, Judge Clifton found that a ruling that Rabkin is not an insider absurd on its face. *See Village at Lakeridge*, 814 F.3d at 1004-05 (J. Clifton, dissenting); (App. A., pp. 24a-25a).

Similarly, this case is an ideal vehicle for the Court to resolve the circuit split; it presents a precise question of law with no material factual disputes.

B. The Question Presented Regarding the Standard of Review for Determining Non-Statutory Insider Status Impacts Many Areas of Bankruptcy Law Requiring Determinations of Insider Status

The question presented is of pressing national importance in bankruptcy law, and will have far-reaching effect not only for future plan confirmation fights, but in many areas of bankruptcy law that often hinge upon a determination of insider status, including fraudulent conveyance and preferential transfer litigation under §§ 547 (applying a one year lookback period for insider transfers), 548 (avoiding certain transfers made to insiders, and case law recognizing that insider transfers are a "badge of fraud"), and 550(c) (authorizing trustees to recover the value of the property transferred to the benefit of a creditor that was an insider within one year before the bankruptcy filing), objections to discharge under § 727(a)(7) (permitting denial of discharge if the debtor committed certain enumerated acts within one year before the bankruptcy filing or during the bankruptcy case, concerning an insider), and even insider transactions subject to the UNIFORM FRAUDULENT TRANSFER ACT ("UFTA"), §§ 4(b) and 5(b) and the UNIFORM VOIDABLE TRANSACTIONS ACT ("UVTA"), §§ 4(b) and 5(b), where cases frequently turn on whether a creditor or transferee is an insider.

Absent the Court's resolution of this issue, appellate courts in the Ninth Circuit and elsewhere will defer to a bankruptcy court's determination of non-statutory insider status under a clear error

standard of review, whereas courts in the Third, Seventh and Tenth Circuits will have a more uniform body of case law for determining non-statutory insider status. This circuit split will encourage forum shopping.

III. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Proper Test to be Employed to Determine Non-Statutory Insider Status

In addition, the Ninth Circuit's published opinion creates a circuit split regarding the proper test to determine non-statutory insider status. The test created by the Panel majority for determining non-statutory insider status directly conflicts with the test applied by the Third and Tenth Circuit Courts of Appeal. Under the Panel majority's new test, the courts must look to (1) "the closeness of the relationship with the debtor **that is comparable to that of the enumerated insider classifications in § 101(31),**" and (2) whether "the relevant transaction is negotiated at less than arm's length." *Village at Lakeridge*, 814 F.3d at 1001 (emphasis added) (citing *Winstar*, 554 F.3d at 395 and *U.S. Med.*, 531 F.3d at 1277); *see also In re Evergreen Energy, Inc.*, 546 B.R. 549, 553-54 (Bankr. D. Del. 2016) (same) (citing *Winstar*, 554 F.3d at 395-97 and legislative history); (App., Ex. A., pp. 13a-14a).

The Panel majority's focus on just a few factors such as control, cohabitation, payment of expenses, and the purchase of expensive gifts because it believed that only those factors are "comparable to . . . the enumerated insider classifications" is inconsistent with other circuit authority. Both the Third and Tenth Circuit decisions upon which the Panel majority relies rejected the "functional equivalent" test for

determining non-statutory insider status. The Third Circuit held that while "actual control (or its close equivalent) is necessary for a person or entity to constitute an insider under § 101(31)'s 'person in control language' . . .[,] a finding of control is not necessary for an entity to be a non-statutory insider." *Winstar*, 554 F.3d at 395-96 (citing *U.S. Med*, 531 F.3d at 1279). As the Third Circuit observed: "To hold otherwise would render meaningless Congress's decision to provide a non-exhaustive list of insiders . . . because the 'person in control' category would function as a determinative test." *Id.* at 396. **The appropriate question is "'whether there is a close relationship [between debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arm's length.'"** *Id.* (emphasis added) (quoting *U.S. Med.*, 531 F.3d at 1277). Accordingly, "a creditor may only be [adjudicated to be] a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length . . . ." *U.S. Med.*, 531 F.3d at 1280; *Winstar*, 554 F.3d at 396-97. *See also Weinman v. Walker (In re Adam Aircraft Indus., Inc.)*, 805 F.3d 888, 894 (10th Cir. 2015) (noting that "someone not specifically listed in the statute can be considered an insider if he or she 'ha[s] a "sufficiently close relationship with the debtor that ... conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor."" (citing *U.S. Med.*, 531 F.3d at 1276) (quoting *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078–79 (10th Cir. 2007) (alterations in original)). As the Tenth Circuit noted in *Adam Aircraft*, "[w]e traditionally refer to these two categories—those specifically listed in the statute and those not specifically mentioned whose relationship still merits a closer level of scrutiny—as, respectively

(and indeed intuitively), statutory and non-statutory insiders." *Adams Aircraft*, 805 F.3d at 894. The "arm's length" test is fully consistent with the statute's legislative history. *Accord* H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6269, 1977 WL 9628; S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N 5787, 5810, 1978 WL 8531.

Although the Seventh Circuit has held that statutory definition of insider "has been expanded by bankruptcy courts to include positions analogous to those enumerated, including in the LLC context", *Longview Aluminum*, 657 F.3d at 509 (citations omitted), this test does not apply to non-statutory insiders. As the Seventh Circuit noted:

> . . . If the alleged insider holds a position substantially similar to the position specified in the definition [of 11 U.S.C. § 101(31)], a court will often find that individual to be an insider. **But based on the legislative history of the statute, our case law has also held that the term insider can also encompass anyone with a "sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor."**

Id. (Emphasis added).

Here, the Panel majority erroneously narrowed the arm's length test for determining non-statutory insider status by imposing an additional requirement that the relationship must be the functional equivalent of a statutory insider. The Panel's deference to the Bankruptcy Court's findings improperly ignored the "arm's length" test employed

by other circuits, and gave short shrift to the many cases holding that close friends and lovers, golfing buddies, business associates, former spouses, and others may be non-statutory insiders.[5] Had the Panel majority applied a *de novo* standard of review, it would have reversed.

As discussed above, the circuit split created by the Ninth Circuit's decision has national importance in bankruptcy law, and will have far reaching effect not only for future plan confirmation fights, but in many

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[5] *See, e.g., Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011-12 (5th Cir. 1992) (former spouse and friend was a non-statutory insider for preference purposes); *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (woman with whom debtor was romantically involved prior to stock transfer was an insider even though they were not together at time of the transfer); *In re A. Tarricone, Inc.*, 286 B.R. 256 (Bankr. S.D.N.Y. 2002) ("golfing budd[y]" and close personal friend found to be insider); *In re Demko*, 264 B.R. 404, 408 (Bankr. W.D. Pa. 2001) (cohabitation by two people may render individual an insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995) (live-in girlfriend may be an insider); *In re Curry*, 160 B.R. 813 (Bankr. D. Minn. 1993) (very close friend and business associate was insider for purposes of fraudulent conveyance liability); *In re Standard Stores, Inc.*, 124 B.R. 318, 325 (Bankr. C.D. Cal. 1991) (corporate debtor's president's ex-brother-in-law was a non-statutory insider for preference purposes); *In re O'Connell*, 119 B.R. 311, 316 (Bankr. N.D. Fla. 1990) ("very good friends" who made informal loans to debtor were insiders); *Castellani v. Kohne (In re Kurcharek)*, 79 B.R. 393 (E.D. Wis. 1987) (close friend found to be an insider).

areas of bankruptcy law including fraudulent conveyance and preferential transfer litigation under §§ 547, 548, and 550, objections to discharge under § 727, equitable subordination, and even insider transactions subject to the UFTA and UVTA, §§ 4(b) and 5(b), where cases frequently turn on whether a creditor or transferee is an insider.

The new test employed by the Panel majority makes it more difficult to establish non-statutory insider status unless the individual is the functional equivalent of a statutory insider. Because the Ninth Circuit reviewed the Bankruptcy Court's non-statutory insider determination for clear error, it limited the non-statutory insider inquiry to just a few factors applied by the Bankruptcy Court rather than applying the well-recognized, "arm's length" test.

Absent this Court's resolution of this issue, courts in the Ninth Circuit will no longer be able to find non-statutory insider status based on the arm's length nature of the transaction unless they also find that the relationship is the functional equivalent of a statutory insider. This circuit split will encourage forum shopping and lead to more litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: June 13, 2016

VENABLE LLP
GREGORY A. CROSS
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Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 8, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-60038, No. 13-60039

IN RE THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY
AND THROUGH CWCAPITAL ASSET
MANAGEMENT LLC, SOLELY IN ITS
CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Argued and Submitted October 22, 2015
Filed February 8, 2016

Appendix A

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and Robert S. Lasnik,* Senior District Judge.

Opinion by Judge N.R. Smith; Partial Concurrence and Partial Dissent by Judge Clifton.

OPINION

N.R. SMITH, Circuit Judge:

Before a bankruptcy court may confirm a reorganization plan in a Chapter 11 bankruptcy, it must determine if any of the persons voting to accept the plan are insiders.[1] Insiders are either statutory or non-statutory. To be a "statutory insider," a creditor *must* fall within one of the categories listed in 11 U.S.C. § 101(31). A creditor does not become an insider simply by receiving a claim from a statutory insider. To be a non-statutory insider, the creditor must have a close relationship with the debtor and negotiate the relevant transaction at less than arm's length. Thus, Dr. Robert Rabkin does not qualify as a statutory or non-statutory insider.[2]

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* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

1. 11 U.S.C. § 1129(a)(10) ("The court shall confirm a plan only if all of the following requirements are met: . . . If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.").

2. In this opinion, we address only Rabkin's statutory and non-statutory insider status. We resolve the remaining claims in a memorandum disposition filed concurrently with this opinion.

Appendix A

I. Factual Proceedings

A. The Parties

The debtor, Village at Lakeridge, LLC ("Lakeridge"), has only one member: MBP Equity Partners 1, LLC ("MBP"). MBP is managed by a board of five members, one of whom is Kathie Bartlett.[3] Bartlett shares a close business and personal relationship with Rabkin, which is unrelated to Bartlett's position with MBP.

U.S. Bank National Association ("U.S. Bank") is successor trustee to Greenwich Financial Products, Inc., the company through which Lakeridge financed a property purchase. At the time Lakeridge filed for bankruptcy, U.S. Bank was one of two creditors holding a claim on Lakeridge's assets. U.S. Bank held a fully secured claim worth about $10 million, and MBP held an unsecured claim worth $2.76 million.

B. Bankruptcy Court Proceedings

Lakeridge filed for Chapter 11 relief on June 16, 2011. On September 14, Lakeridge filed a Disclosure Statement and an initial Plan of Reorganization. Shortly thereafter, MBP's board decided to sell MBP's unsecured

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3. Although Bartlett signed Lakeridge's bankruptcy petition and all related documents on behalf of Lakeridge, she testified that she did not have authority to make decisions for MBP—or Lakeridge—on her own.

claim.[4] Bartlett, on behalf of MBP's board, approached Rabkin with an offer to sell the claim. On October 27, Rabkin purchased the claim for $5,000. In its Disclosure Statement, Lakeridge classified Rabkin's claim as a "Class 3 general unsecured claim."

On June 7, 2012, U.S. Bank deposed Rabkin, questioning him about his relationship with Lakeridge, MBP, and Bartlett. In his testimony, Rabkin indicated he had little knowledge of, and no relationship with, Lakeridge or MBP before he acquired MBP's claim. However, Rabkin testified that he had a close relationship with Bartlett, that he saw her regularly, including the day of the deposition, and that he had attended a meeting with his counsel and Lakeridge's counsel one hour before the deposition. Rabkin testified that he purchased MBP's unsecured claim as a business investment, that he had not known how much his claim was worth before the deposition, and that he knew the claim was a risky investment. Rabkin further testified that, prior to the deposition, he had not known his distribution under the proposed reorganization plan was $30,000. Rabkin claimed to have no interest in Lakeridge other than receiving a return on his investment.

U.S. Bank, through counsel, offered to purchase Rabkin's claim for $50,000 at the deposition. Rabkin said he would consider the offer. U.S. Bank, in an attempt to compel an immediate answer, increased its offer to

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4. Bartlett testified that MBP's board decided to sell its claim for two reasons: (1) the claim was useless to MBP because it could not vote the claim in favor of its reorganization plan; and (2) the board believed there "may be a tax advantage in selling [the] claim."

$60,000. Rabkin again agreed to consider the offer, refusing to provide an answer on the spot. After Rabkin consulted with counsel, he did not respond to the offer. The offer lapsed. At a hearing on August 29, 2012, Rabkin stated he had felt pressured to accept U.S. Bank's cash offer while he was under oath, without having time to review it first.[5]

On July 1, 2012, U.S. Bank moved to designate Rabkin's claim and disallow it for plan voting purposes ("Designation Motion"). U.S. Bank contended Rabkin was both a statutory and non-statutory insider, and that the assignment to Rabkin was made in bad faith. The bankruptcy court held an evidentiary hearing on the Designation Motion on August 1, 2012. In its subsequent order ("Designation Order"), the court held Rabkin was not a non-statutory insider, because:

> (a) Dr. Rabkin does not exercise control over [Lakeridge;] (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms.

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5. The district court judge explained that he "underst[ood] the doctor or many people would have been put off by [U.S. Bank's approach to acquiring Rabkin's claim] and [he didn't] think it[was] at all surprising that [Rabkin] would reject it and not really be interested in dealing with the people who made the offer to him thereafter."

Bartlett has never purchased expensive gifts for Dr. Rabkin.

The court also held that Rabkin did not purchase MBP's claim in bad faith. However, the court designated Rabkin's claim and disallowed it for plan voting, because it determined Rabkin had become a statutory insider by acquiring a claim from MBP. In other words, the bankruptcy court determined that, when a statutory insider sells or assigns a claim to a non-insider, the non-insider becomes a statutory insider as a matter of law.

Lakeridge and Rabkin both timely appealed the Designation Order, challenging the court's finding that Rabkin was a statutory insider for purposes of plan voting. U.S. Bank cross-appealed, challenging the findings that Rabkin was not a non-statutory insider and had not purchased MBP's claim in bad faith.

C. Bankruptcy Appellate Panel

The United States Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") affirmed in part, reversed in part, and vacated in part the Designation Order. The BAP reversed the finding that Rabkin had become a statutory insider as a matter of law by acquiring MBP's claim and affirmed the findings that Rabkin was not a non-statutory insider and that the claim assignment was not made in bad faith.[6] The BAP held that insider status cannot be

6. The question of bad faith is addressed in the memorandum disposition filed concurrently with this opinion and will not be addressed here.

assigned and must be determined for each individual "on a case-by-case basis, after the consideration of various factors." Finally, the BAP held Rabkin could vote to accept the Lakeridge plan under 11 U.S.C. § 1129(a)(10), because he was an impaired creditor who was not an insider. U.S. Bank appealed. We have jurisdiction under 28 U.S.C. § 158(d),[7] and we affirm.

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7. Under 28 U.S.C. § 158(d), we "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" of the BAP. A decision is considered "final and . . . appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836 (9th Cir. 2008) (quoting *Schulman v. California (In re Lazar)*, 237 F.3d 967, 985 (9th Cir. 2001)). When the BAP "affirms or reverses a bankruptcy court's final order," the BAP's order is also final. *Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.)*, 968 F.2d 887, 895 (9th Cir. 1992). However, if the BAP "remands for factual determinations on a central issue, its order is not final and we lack jurisdiction to review the order." *Id.*

> The bankruptcy court issued two orders: (1) the Designation Order (finding that Rabkin was not a non-statutory insider and had not acted in bad faith, but nevertheless designating his claim and disallowing it for plan voting purposes because he had acquired the claim from a statutory insider) and (2) the Discovery Order (denying U.S. Bank's Discovery Motions). Both bankruptcy court orders "finally determine[d]" Rabkin's right to vote on Lakeridge's reorganization plan and were therefore final orders. *See In re AFI Holding, Inc.*, 530 F.3d at 836.
>
> However, the BAP's decision as issued was not final, because, although it affirmed and reversed portions of the bankruptcy court orders, it also remanded for discovery to allow factual determinations central to

II. Standard of Review

We review the bankruptcy court's decision independent of the BAP's decision. *See Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1090 (9th Cir. 2009). Whether an insider's status transfers when he sells or assigns the claim to a third party presents a question of law. *Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners)*, 319 B.R. 626, 630 (B.A.P. 9th Cir. 2004). Establishing the definition of non-statutory insider status is likewise a purely legal inquiry. We review questions of law de novo. *Stahl v. Simon (In re Adamson Apparel)*, 785 F.3d 1285, 1289 (9th Cir. 2015).

Whether a specific person qualifies as a non-statutory insider is a question of fact. *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991), *overruled on other grounds by Zachary v. Cal. Bank & Tr.*, No. 13-16402, 811 F.3d 1191, 2016 U.S. App. LEXIS 1368 (9th Cir. Jan. 28, 2016). We review factual findings for clear error. *In re Adamson Apparel*, 785 F.3d at 1289.

Rabkin's non-statutory insider status and ability to vote on Lakeridge's reorganization plan.

To make the BAP's decision final, U.S. Bank withdrew its arguments concerning the Discovery Order at oral argument, removing the need for remand. Because U.S. Bank withdrew its appeal concerning the Discovery Order, we will not discuss it in this opinion. Nor may U.S. Bank seek to enforce the BAP's holding on that issue at the bankruptcy court level.

III. Discussion

"An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms [*sic*] length with the debtor." S. Rep. No. 95-989, at 25 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; H.R. Rep. No. 95-595, at 312 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. We recognize two types of insiders: statutory insiders and non-statutory insiders. Statutory insiders, also known as "per se insiders," are persons explicitly described in 11 U.S.C. § 101(31), such as "person[s] in control of the debtor." § 101(31). As a matter of law, a statutory insider has a sufficiently close relationship with a debtor to warrant special treatment. *In re Enter. Acquisition Partners*, 319 B.R. at 631. No one suggests Rabkin qualifies as a statutory insider in his own right.

A non-statutory insider is a person who is not explicitly listed in § 101(31), but who has a sufficiently close relationship with the debtor to fall within the definition. *See Schubert v. Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009) ("[I]n light of Congress's use of the term 'includes' in § 101(31), courts have identified a category of creditors, sometimes called 'non-statutory insiders,' who fall within the definition but outside of any of the enumerated categories."); *see also* § 101(31) (stating that "[t]he term 'insider' *includes*" the listed categories (emphasis added)); § 102(3) (explaining that "includes" is "not limiting").

A. Statutory Insider Status

U.S. Bank asserts that Rabkin became a statutory insider when he acquired a claim from MBP. We disagree. A person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons. First, bankruptcy law distinguishes between the status of a claim and that of a claimant. Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply. Second, a person's insider status is a question of fact that must be determined after the claim transfer occurs. *See Concord Square Apartments of Wood Cty., Ltd. v. Ottawa Props., Inc. (In re Concord Square Apartments)*, 174 B.R. 71, 75 (Bankr. S.D. Ohio 1994). This determination does not ignore the public policy behind protecting secured creditors' interests in bankruptcy cases, as explained below.

The term "insider," as used in the bankruptcy code, is a noun, referring to a person (as defined at § 101(41)). *See, e.g.*, § 101(31) (defining "insider" as a person with a particular relationship with the debtor); *see also* § 1129(a)(10) (explaining that a court can cram down a reorganization plan when at least one class of impaired claims has voted to accept the plan, not including "any acceptance of the plan by an insider"). The term "insider" is not, as U.S. Bank argues, an adjective used to describe the property of a claim.[8]

8. If U.S. Bank's argument were true, we would expect to find references to "the holder of an insider claim" rather than "an insider" in the bankruptcy code.

Appendix A

Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis. *See, e.g., In re Friedman*, 126 B.R. at 67, 70-71 (describing in detail the alleged insiders' relationships with the debtor); *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586-87 (B.A.P. 9th Cir. 1987) (per curiam) (analyzing facts to determine whether the debtor and alleged insider had a sufficiently close relationship to warrant finding insider status). Courts may not bypass this intensive factual analysis by finding that a third party became an insider as a matter of law when he acquired a claim from an insider. If so, a third-party assignee could be foreclosed from voting a claim acquired from an insider, even if the entire transaction was conducted at arm's length. The bankruptcy code did not intend this result.

Further, if a third party could become an insider as a matter of law by acquiring a claim from an insider, bankruptcy law would contain a procedural inconsistency wherein a claim would *retain* its insider status when assigned from an insider to a non-insider, but would *drop* its non-insider status when assigned from a non-insider to an insider. *See In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991) (holding that an insider of a Chapter 11 debtor may never vote a claim toward plan confirmation, even if the insider acquired the claim from a non-insider); *In re Holly Knoll Partnership*, 167 B.R. 381, 385 (Bankr. E.D. Pa. 1994) (same).

Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan. A court may confirm a plan only if, among other requirements: (1) the plan and plan proponent comply with the bankruptcy

code; (2) the plan is proposed in good faith; (3) the plan proponent has disclosed the identity of all insiders and potential insiders; (4) at least one class of impaired claims has accepted the plan (and no insider can vote); and (5) the plan "is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." § 1129. In addition, a court "may designate any entity whose acceptance or rejection of [a] plan was not in good faith, or was not solicited or procured in good faith." § 1126(e). Therefore, U.S. Bank overstates its argument that, unless we reverse the BAP, debtors will begin assigning their claims to third parties in return for votes in favor of plan confirmation.[9] We fail to see how establishing a rule that insider status transfers as a matter of law would better protect the creditors' rights than the current factual inquiry.[10]

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9. For this assertion, U.S. Bank cites *In re Heights Ban Corp.*, 89 B.R. 795 (Bankr. S.D. Iowa 1988). There, the court concluded insider status must transfer with a claim upon assignment, otherwise "the operation of section 1129(a) would be seriously undermined. Debtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties, who in turn could vote to accept." *Id.* at 799. Although the language in that case supports U.S. Bank's position, the facts do not. The assignor in *In re Heights Ban Corp.* transferred more than his claim; he and his co-shareholders also transferred their shareholder interests in the debtor to the assignee. *Id.* The court concluded that the assignors' and assignee's interests were "so interlocked . . . [as to be] indistinguishable with respect to the debtor for purposes of section 1129(a)(10)." *Id.* Thus, the assignee became an insider by becoming a shareholder of the debtor, not simply by acquiring a claim from a statutory insider.

10. U.S. Bank correctly points out that this court previously determined insider status does transfer with a claim under the

In conducting a factual inquiry for insider status, courts should begin with the statute. If the assignee fits within a statutory insider classification on his own, the court's review ends; it need not examine the nature of the statutory insider's relationship to the debtor. *See In re Enter. Acquisition Partners*, 319 B.R. at 631. Because Rabkin did not become a statutory insider by way of assignment and was not a statutory insider in his own capacity, we must determine whether the bankruptcy court erred in finding that Rabkin was not a non-statutory insider.

B. Non-Statutory Insider Status

Non-statutory insiders are the functional equivalent of statutory insiders and, therefore, must fall within the ambit of § 101(31). *See In re Winstar Commc'ns, Inc.*, 554 F.3d at 395. A creditor is not a non-statutory insider unless: (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length.[11] *See Anstine v.*

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general law of assignment. *See Wake Forest v. Transamerica Title Ins. Co. (In re Greer W. Inv. Ltd. Pshp)*, No. 94-15670, 1996 U.S. App. LEXIS 8495, 1996 WL 134293 (9th Cir. Mar. 25, 1996) (unpublished). However, Ninth Circuit Rule 36-3 prohibits parties from citing "[u] npublished dispositions . . . of this Court issued before January 1, 2007 . . . to the courts of this circuit." Thus, U.S. Bank should not have relied upon, or cited, *In re Greer West* in its arguments, and we are not bound by the decision.

11. An "arm's length transaction" is: "1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between

Carl Zeiss Meditec AG (In re U.S. Med., Inc.), 531 F.3d 1272, 1277 (10th Cir. 2008). A court cannot assign non-statutory insider status to a creditor simply because it finds the creditor and debtor share a close relationship. *See id.* at 1277-78.

A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length. Having—or being subject to—some degree of control is one of many indications that a creditor may be a non-statutory insider, but actual control is not required to find non-statutory insider status.[12] *See id.* at 1277 n.5. Likewise, access to the debtor's inside information may—but not shall—warrant a finding of non-statutory insider status. *See id.* at 1277.

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two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction, Black's Law Dictionary* (10th ed. 2014). The dissent quotes both definitions, but interprets them to mean that *any* affinity between two parties renders a transaction less than arm's length rather than returning to the definition in § 101(31) for guidance. *See* Dissent at 23.

12. As noted by the Tenth and Third Circuits, if actual control were required for non-statutory insider status, all non-statutory insiders would also be statutory insiders under 11 U.S.C. § 101(31). § 101(31)(A)(iv) (defining "insider" as a "corporation of which the debtor is a director, officer, or *person in control*" (emphasis added)); § 101(31)(B)(iii), (C)(v) (defining "insider" as a "person in control of the debtor"); *In re Winstar Commc'ns, Inc.*, 554 F.3d at 396; *In re U.S. Med., Inc.*, 531 F.3d at 1279. Such construction of § 101(31) would render meaningless the language: "the term 'insider' *includes*."

U.S. Bank asserts the bankruptcy court erred in holding Rabkin was not a non-statutory insider. We review the bankruptcy court's factual finding for clear error.[13] *In re Friedman*, 126 B.R. at 70; Fed. R. Civ. P. 52(a)(6). "A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). We apply this highly deferential standard to findings of fact, because "[f]indings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc); *see also* Fed. R. Civ. P. 52(a)(6) ("[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Therefore, so long as the bankruptcy court's findings are "plausible in light of the record viewed in its entirety," we cannot reverse even if we "would have weighed the evidence differently." *Anderson v. City of Bessemer*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

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13. The dissent argues that "Rabkin's status [is] a mixed question of law and fact, subject to de novo review." Dissent at 25. Stating that an issue is a "mixed question" is simply the dissent's backdoor to reassessing the facts. As stated in Section II, we have two distinct issues in question, each with a different standard of review. First, we reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question. Now, we must analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review.

The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous.[14] U.S. Bank presents no evidence that Rabkin had a relationship with Lakeridge comparable to those listed in § 101(31). Rather, the evidence shows Rabkin had little knowledge of Lakeridge—or its sole member MBP—prior to acquiring MBP's unsecured claim, much less access to inside information. Rabkin does not control MBP or Lakeridge, nor does Lakeridge or MBP have any control over Rabkin. U.S. Bank has shown that Rabkin had a close personal and business relationship with Bartlett, and that Bartlett approached Rabkin, and only Rabkin, with an offer to sell MBP's claim. However, Bartlett does not control MBP or Lakeridge. Rather, Bartlett was one of MBP's five managing members, all of whom discussed potential buyers and agreed to offer the claim to Rabkin. Rabkin did not know, and had no relationship with, the remaining four managing members of MBP.

U.S. Bank has not shown that Rabkin's relationship with Bartlett—who is indisputably a statutory insider of MBP and Lakeridge—is sufficiently close to compare with any category listed in § 101(31). Rabkin had no control over Bartlett, and Bartlett had no control over Rabkin. Rabkin and Bartlett kept separate finances, lived separately, and conducted business separately. The bankruptcy court

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14. The dissent explains how it would have decided this case had it been sitting as the bankruptcy court judge. However, it was not the bankruptcy court judge. The dissent did not preside over the evidentiary hearing and did not hear the evidence in person. This court cannot substitute its judgment for that of the bankruptcy court "simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

properly evaluated these factors to determine whether Rabkin's relationship with Bartlett was close enough to make him an insider who was conducting business at less than arm's length with MBP.[15] Nothing in § 101(31) or case law indicates it would be improper for a debtor to sell, or even give, a claim to a friend if the friend is acting of his own volition and neither party is engaged in bad faith. *See In re Friedman*, 126 B.R. at 70 ("The case law that has developed . . . indicates that not every creditor-debtor relationship attended by a degree of personal interaction between the parties rises to the level of an insider relationship.").

Both Rabkin and Bartlett testified that, although Rabkin knew Lakeridge was in bankruptcy and that purchasing the claim was a risky investment, when Rabkin purchased the claim he did not know about Lakeridge's plan of reorganization or that his vote would be required to confirm it. Although Rabkin did not conduct an extensive inquiry into the claim's value prior to purchasing it, Rabkin explained that it was a small investment upon which Bartlett had indicated he could make a profit and "due diligence would have been very expensive."[16]

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15. The dissent asserts that the bankruptcy court applied the wrong legal standard because it did not state the words "arm's length transaction" in its final order. Dissent at 25. The court's failure to use the words "arm's length transaction" is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider. The court should not be discredited for listing the specific facts that made the transaction arm's length rather than merely stating a conclusion.

16. The dissent argues that "the only logical explanation for Rabkin's actions" is that "[h]e did a favor for a friend." Dissent at 23.

Although Rabkin allowed U.S. Bank's offer to purchase the claim for $50,000 to lapse and subsequently voted in favor of Lakeridge's reorganization plan, he did so on the understanding that Lakeridge would amend the reorganization plan to increase his payout to an amount comparable to that offered by U.S. Bank.

These facts do not leave us with a "definite and firm conviction that a mistake has been committed." *See U.S. Gypsum Co.*, 333 U.S. at 395. Rather, the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible, and we cannot reverse even if we may "have weighed the evidence differently." *See Anderson*, 470 U.S. at 574.

IV. Conclusion

The BAP properly reversed the bankruptcy court's holding as to Rabkin's statutory insider status and affirmed the bankruptcy court's holding as to Rabkin's non-statutory insider status. Because Rabkin is neither a statutory nor non-statutory insider, the BAP properly reversed the portion of the bankruptcy court's order that excluded Rabkin's vote for plan confirmation purposes. Therefore, the judgment of the BAP is **AFFIRMED**.

However, the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical.

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I agree with the legal conclusion that a person does not necessarily become a statutory insider solely by acquiring a claim from a statutory insider, as discussed in section III.A of the majority opinion. As long as the interest previously owned by a statutory insider was acquired by an independent party, for bona fide reasons, uninfected with the unique motivations of the insider, there is no reason that the insider taint should always be unshakeable. The consideration of whether the insider status should stick to the interest properly depends on the particular circumstances and is appropriately treated as something to be determined based on the facts of the situation. But it is clear to me, based on the facts of this case, that Robert Rabkin should be viewed as a non-statutory insider, and the bankruptcy court should treat his claim as such. I respectfully dissent as to Section III.B.

The majority opinion, at 15-16, defines a creditor as a non-statutory insider when "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." I agree.

The facts make it clear that this transaction was negotiated at less than arm's length. Rabkin paid $5,000 to MBP (the sole member of the debtor, Lakeridge), for an unsecured claim against Lakeridge nominally worth $2.76 million. MBP did not offer the interest to anyone

else. The purchase was not solicited by Rabkin. It was proposed to Rabkin by Kathie Bartlett, a member of the MBP board. There was no evidence of any negotiation over price — Rabkin didn't offer less, and MBP didn't ask for more. Rabkin knew little if anything about Lakeridge (or, for that matter, MBP) before he bought the claim, nor did he conduct any investigation to ascertain the current value of that unsecured claim. Even after he purchased the claim, he did not bother to find out more about what it might be worth. Prior to his deposition Rabkin did not even know what the proposed plan of reorganization would pay him for the claim. After he learned that the payment under the plan would be $30,000, he was offered as much as $60,000 for his interest, but he declined that offer.[1]

The motives of MBP and Bartlett are clear and not denied. MBP is the sole member of Lakeridge. The Lakeridge reorganization plan cannot be approved unless there is a class of creditors willing to vote to approve it. Without the sale of this claim to Rabkin and his anticipated vote to approve the plan, that plan is dead in the water, Lakeridge will be liquidated, and there will be no hope for MBP to obtain anything for either the unsecured claim or,

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1. The offer was made in a crude manner at Rabkin's deposition by the attorney for U.S. Bank. The manner in which the offer was presented and the demand for an immediate response weighs against putting much weight on Rabkin's rejection of the offer. Even after reflection and consultation with his counsel, however, Rabkin declined the offer and did nothing to pursue any opportunity to realize more than $30,000 for his interest. That behavior does not support the view that his motivations were purely economic or that his decision-making was that of a party acting at arm's length without regard for his personal relationship with an insider.

more importantly, its ownership of Lakeridge. It may have wanted to recover something from its unsecured claim, but it did not look for the best possible price because its Lakeridge ownership was far more important. MBP was primarily motivated to place the unsecured claim in the hands of a friendly creditor who could be counted on to vote in favor of the reorganization plan, opening the door to the possibility of obtaining approval of the proposed plan of reorganization.

Rabkin's motivation is a bit murkier, but it is clear that the transaction cannot be understood as a primarily economic proposition on his part. There was no evidence that he had a habit of making blind bets, say by helping out Nigerian princes or buying the Brooklyn Bridge. There is an alternative explanation that makes a lot more sense. As the majority opinion acknowledges, at 6, Rabkin had a "close business and personal relationship" with Bartlett, the person who proposed this transaction to him. I don't have to know the precise details of the relationship between Rabkin and Bartlett to conclude that it offers the only logical explanation for Rabkin's actions here. He did a favor for a friend, and if it made some money for himself, so much the better.

Rabkin may not have been setting out to lose money or planning simply to give $5,000 to Bartlett, but that is not the standard. *Black's Law Dictionary* (10th ed. 2014) defines "arm's length transaction" as follows:

> 1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between

> two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises.

Rabkin and Bartlett were not "unrelated and unaffiliated parties." The transaction was not conducted "as if the parties were strangers." It was not an arm's length transaction. As a result, under the definition recognized by the majority, Rabkin was a "non-statutory insider" because "the relevant transaction [was] negotiated at less than arm's length."

Rabkin at no point attempted to negotiate the price of his purchase, research the value of the claim that was offered to him, or otherwise behave in a manner that suggests that he took his acquisition seriously as an economic investment. This "compels the conclusion" that Rabkin and Bartlett's relationship was "close enough to gain an advantage attributable simply to affinity rather than to the course of dealings between the parties." *In re Kunz*, 489 F.3d 1072, 1079 (10th Cir. 2007) (quoting *In re Enter. Acquisition Partners, Inc.*, 319 B.R. 626, 631 (B.A.P. 9th Cir. 2004)); *see also, Matter of Holloway*, 955 F.2d 1008, 1011 (5th Cir. 1992).

Moreover, though the majority opinion treats the bankruptcy court's determination that Rabkin was not a non-statutory insider as a factual finding subject to review only for clear error, I do not think that reflects a correct understanding of what the bankruptcy court decided. The specific facts of the episode were not seriously contested. Rather, the majority simply accedes to the bottom-line

adjudication that, based on those facts, Rabkin was not an insider.

But that finding turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts. Look at what the bankruptcy court said in explaining its conclusion that Rabkin was not a non-statutory insider, quoted by the majority opinion, at 8:

> (a) Dr. Rabkin does not exercise control over [Lakeridge;] (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

This list of facts would support a finding that Rabkin and Bartlett are separate financial entities, but it does not show that this transaction was conducted as if they were strangers. At no point does the bankruptcy court mention or refer to an "arm's length transaction" at all, let alone provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers. That is the standard the majority opinion and I both agree should apply, but it was not the standard actually applied by the bankruptcy court. The majority disagrees, stating, at 19 n.15, that the bankruptcy court's order "is a description of why the transaction was

conducted at arm's length," but the majority opinion is conspicuously silent in explaining how the facts actually justify any such finding.

That tells me that the problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied. What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.").

I do not need to pursue that question further here, though, because even if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny. The majority opinion states three separate times, at 17, 18 n.14 & 20, that we cannot reverse under the clear error standard simply because we would have decided the case differently, a telling sign that even the majority recognizes that support for the finding is thin at best. It even suggests, at 18 n.14, that this dissent presents nothing more than a statement of how I would have decided the case sitting as a bankruptcy judge. But my dissent is based on far more than a mere alternative view of the evidence. I cannot fathom how anyone could

reasonably conclude that this transaction was conducted as if Rabkin and Bartlett were strangers. The clear error standard is not supposed to provide carte blanche approval of whatever the bankruptcy court might have found. That is especially true here, where the bankruptcy court never actually stated a finding that the transaction was at arm's length or that the parties conducted the transaction as if they were strangers. Under the proper definition of "arm's length transaction," Rabkin's acquisition of the claim was a transaction "negotiated at less than arm's length." He was a non-statutory insider, and his claim should be treated as such.

The majority's holding also has the troubling effect of creating a clear path for debtors who want to avoid the limitations the Bankruptcy Act places on reorganization plans. The Act allows courts to confirm bankruptcy plans if each class of claims or interests impaired under the plan votes to accept the plan. 11 U.S.C. § 1129(a)(8). Perhaps recognizing that unanimous agreement on a given bankruptcy plan would sometimes prove impossible, Congress also created an exception to § 1129(a)(8) allowing debtors to "cram down" a bankruptcy plan over the objections of some debtor classes. The cramdown provision allows courts to approve a bankruptcy plan so long as all provisions of § 1129(a) are met except for § 1129(a)(8), and the proposed plan is fair, equitable, and does not discriminate unfairly. 11 U.S.C. § 1129(b)(1). Even in the case of a cramdown, though, "at least one class of claims that is impaired under the plan [must have] accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

The legislative history on § 1129 is sparse and provides little insight into Congress's motives,[2] but in accordance with one of the most basic tenets of statutory interpretation, we must "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States EPA.*, 942 F.2d 1427, 1432 (9th Cir. 1991). Here, we are obligated to interpret § 1129 as a whole and in a way that gives each of its provisions meaning. A cramdown plan cannot be approved unless it is accepted by at least one class of impaired creditors.

Yet the majority opinion effectively renders that statutory requirement meaningless. Under the holding here, insiders are free to evade the requirement simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a friendly third party, who can then cast the vote the insider could not have cast itself.

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2. As the Fifth Circuit has noted, "the scant legislative history on § 1129(a)(10) provides virtually no insight as to the provision's intended role." *In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239, 246 (5th Cir. 2013) (citing National Bankruptcy Conference, *Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project* 277 (1994) (noting that the legislative history of § 1129(a)(10) "is murky, shedding little light on its intended role"); Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. Kan. L.Rev. 507, 538 (1998) (noting that "[t]he legislative history . . . sheds little light on the rationale for section 1129(a)(10)")).

Contrary to the majority's assurances, the requirement that all votes be cast in good faith is not a check on this behavior. In the memorandum disposition issued alongside this opinion, we conclude that Rabkin's vote for the plan was cast in good faith because Appellants had not proven that he had "ulterior motives" for his vote to approve the plan beyond personal enrichment. By this standard, a savvy debtor can comply with the good faith requirement by following a simple formula: develop a reorganization plan that would provide a payout on the insider claim if approved, and then sell the claim to a friendly third party for a price lower than the payout. This enables the debtor to maneuver the third party into a position where it would be foolish not to vote for approval of the reorganization plan, ensuring a "yes" vote and thereby allowing the debtor to effectively avoid the requirement under § 1129(a)(10) that at least one non-insider must approve the plan.

Congress cannot have intended this outcome. If it had, it would not have required that at least one class of impaired creditors — excluding insiders — vote for a plan before it can be approved. Our holding here effectively negates that part of the statute.

I respectfully dissent.

APPENDIX B — MEMORANDUM OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT, FILED APRIL 5, 2013

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP Nos. NV-12-1456-PaKiTa,
NV-12-1474-PaKiTa (Cross-appeals)

Bk. No. 11-51994-BTB

In re:

THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor.

THE VILLAGE AT LAKERIDGE, LLC, FKA MAGNOLIA VILLAGE, LLC; ROBERT ALAN RABKIN, M.D.,

Appellants/Cross-appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE REGISTERED HOLDERS OF GREENWICH

Appendix B

CAPITAL COMMERCIAL FUNDING CORP., COMMERCIAL MORTGAGE TRUST 2005-GG3, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2005-GG3, BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellee/Cross-appellant.

March 22, 2013, Argued; April 5, 2013, Filed

Appeal from the United States Bankruptcy Court for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Before: PAPPAS, KIRSCHER and TAYLOR, Bankruptcy Judges.

MEMORANDUM[1]

Chapter 11[2] debtor The Village at Lakeridge, LLC ("Lakeridge") appeals the order of the bankruptcy

1. This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see* Fed. R. App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8013-1.

2. Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as Civil Rules.

court granting in part the motion of U.S. Bank National Association as Trustee[3] ("USB") to (A) designate claim of Robert Rabkin and (B) disallow such claim for plan voting purposes ("Designation Motion"). USB cross-appeals (1) the part of the order granting the Designation Motion holding that Dr. Robert Rabkin ("Rabkin") was not a non-statutory insider of Lakeridge and (2) an order denying requests to intervene in discovery disputes ("Discovery Requests"). We AFFIRM in part, REVERSE in part, and VACATE in part the order regarding the Designation Motion. We AFFIRM in part and VACATE in part the order denying the Discovery Requests.

FACTS

Lakeridge filed a chapter 11 petition on June 16, 2011. It owned and operated a commercial real estate development in Reno, Nevada (the "Property"). It purchased the Property in January 2004 and financed the purchase with a loan, evidenced by a promissory note, from Greenwich Financial Products, Inc. Apparently, USB now holds the fully secured claim for the balance due on this loan, which amounts to about $10 million; this is the only secured claim in the bankruptcy case.

The sole member of Lakeridge is MBP Equity Partners 1, LLC ("MBP"). Kathie Bartlett ("Bartlett") is a member of the board of managers of MBP. The only unsecured claim listed in Lakeridge's bankruptcy schedules was one for $2,761,000.00 held by MBP (the

3. For USB's full authority as trustee, see caption.

"MBP Claim").[4] Bartlett signed the bankruptcy petition and all related documents on behalf of Lakeridge.[5]

Lakeridge filed a Disclosure Statement and Plan of Reorganization on September 14, 2011.[6] The only claims addressed in the Disclosure Statement and Plan were the fully secured claim of USB and the MBP Claim.

On October 27, 2011, Rabkin purchased the MBP Claim for the sum of $5,000.00. A Notice of Assignment of the MBP Claim to Rabkin was filed with the bankruptcy court on November 4, 2011.

A hearing was held on the Disclosure Statement on November 7, 2011. It does not appear that the Rabkin assignment was discussed at the hearing. The bankruptcy court approved the Disclosure Statement by order on November 23, 2011.

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4. The schedules also listed about $50,000 in tenant deposits as unsecured claims. Later, Lakeview withdrew classification of those deposits as unsecured claims when it assumed the leases; USB has not challenged Lakeridge's position.

5. None of the papers signed by Bartlett indicate her title. We are unable to determine from the record the precise nature of her position and authority in Lakeridge other than that she is a member of the board of managers. She described her position at her deposition as "representative of both the Village at Lakeridge, LLC and the equity owners." Bartlett Dep. 9:10-11, February 9, 2012. However, the parties do not dispute that she was the officer of the debtor responsible for its filings or that she is an "insider" of the debtor.

6. With changes not relevant in this appeal, the Plan of Reorganization was amended on November 4, 2011, and January 12, 2012.

Bartlett was deposed by USB on February 9, 2012, in her capacity as a representative of Lakeridge.

On June 7, 2012, Rabkin testified at a USB deposition. Early in his deposition, Rabkin testified that he had attended a meeting one hour before the deposition with his counsel and counsel for Lakeridge. When asked what he discussed with Lakeridge's counsel, Lakeridge's attorney objected, invoking the "common interest privilege." Rabkin Dep. 11:20-2, June 7, 2012. Rabkin's counsel joined in the objection and ultimately directed Rabkin not to answer the question.

Rabkin testified to the following matters in that deposition: (1) that he had both a business and close personal relationship with Bartlett; (2) that he saw Bartlett regularly, including on the day of the deposition; and (3) that he purchased the MBP Claim for $5,000 as a business investment and expected to be paid a pro rata dividend of $30,000 under the Lakeridge plan. As to any other interest in the Lakeridge bankruptcy case, Rabkin testified as follows:

> USB COUNSEL: Other than getting paid in this bankruptcy case, do you have any other concerns?
>
> RABKIN: I'm concerned that I may run up a lot of expenses and get paid nothing.
>
> USB COUNSEL: Other than getting paid the $30,000, do you care whether the Village at

> Lakeridge plan gets confirmed? Setting aside the payment, if you were to get paid the $30,000, would you care if the plan was confirmed?
>
> RABKIN: I have no other interest in the Village at Lakeridge.

Rabkin Dep. 82:3-14.

Near the end of the deposition, USB, through counsel, offered to purchase the MBP Claim from Rabkin for $50,000; when he declined, counsel increased the offer to $60,000. Rabkin did not accept the offer.[7]

Shortly after the Rabkin deposition, USB by letter requested that the bankruptcy court intervene in two discovery disputes in the bankruptcy case: (1) whether the common interest privilege applied so as to protect disclosure of communications between Rabkin and Lakeridge's counsel; and (2) to compel Bartlett to sit for a second deposition, this time in her individual capacity as opposed to her first deposition as representative of Lakeridge (previously defined as the "Discovery Requests").

The bankruptcy court held a hearing on June 21, 2012, on USB's Discovery Requests. After reviewing letter

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7. At a hearing on August 29, 2012, Rabkin indicated that he felt USB's counsel took advantage of a deponent who was under oath by pressuring him to accept a cash offer without an adequate chance to review it. The bankruptcy court would later apologize to Rabkin "on behalf of the legal profession" for the offensive conduct of USB's attorney in the deposition. Hr'g Tr. 21:1-2, August 29, 2012.

briefs from USB, Lakeridge and Rabkin, and hearing from their counsel, the court ruled on the record that the Ninth Circuit's decision in *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) supported the application of the common interest privilege in this case and denied USB's request to compel Rabkin to disclose his communications with Lakeridge's attorneys. As to USB's request for a second deposition for Bartlett, the court ruled that she had been extensively examined already and the court would not require a second examination.

On July 1, 2012, USB filed the Designation Motion. USB contended in that motion that Rabkin was a statutory insider by virtue of the assignment of the MBP insider claim to him, and that he was a non-statutory insider because of his relationship with Bartlett. USB also argued that the assignment of the claim to Rabkin was in bad faith. Lakeridge responded, arguing that Rabkin was neither a statutory nor a non-statutory insider, and that there was no bad faith involved in Rabkin's acquisition of the claim.

The bankruptcy court held an evidentiary hearing on the Designation Motion on August 1, 2012. USB, Lakeridge, and Rabkin were represented by counsel, and Rabkin and Bartlett testified.

After a recess, the bankruptcy court announced its decision on the record. It granted the Designation Motion in part and denied it in part. The court entered an order to memorialize its ruling on August 20, 2012 (the "Designation Order").

First, the Designation Order recited that "The court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things: (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabit with Ms. Bartlett and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett." Designation Order at ¶ 2, August 20, 2012. The bankruptcy court also concluded that the converse was true: that Bartlett exercised no such control or provided gifts to Rabkin.

Next, the bankruptcy court decided that the MBP Claim "was not assigned to Dr. Rabkin in bad faith." Designation Order at ¶ 3. It explained that Dr. Rabkin was not compelled to sell his claim to USB, his purchase of the MBP claim was a legitimate investment, and that Bartlett never asked him to vote in favor of the plan.

However, the bankruptcy court reasoned, "Because [MBP] is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim." Designation Order at § 6. The court supported its conclusion with citation to several authorities. The Designation Order gave no other explanation for its ruling that Rabkin was a statutory insider. As a consequence, the court decided that "[b]ecause Dr. Rabkin's vote cannot be considered for voting purposes in order to confirm the Debtor's Plan, the Debtor does not have an impaired, assenting class of claims necessary to confirm his Plan." Designation Order at ¶ 9.

Lakeridge and Rabkin both filed timely appeals of the Designation Order. USB also filed a timely cross-appeal challenging the provision of the Designation Order that Rabkin was not a non-statutory insider, and also seeking review of the bankruptcy court's prior order denying the Discovery Requests.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (L) and (O). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court erred in deciding that Rabkin was an insider of Lakeridge under § 101(31).

2. Whether the bankruptcy court erred in deciding that Rabkin's acceptance of the Lakeridge plan would be excluded under § 1129(a)(10).

3. Whether the bankruptcy court erred in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e).

4. Whether the bankruptcy court abused its discretion in declining to order that Bartlett submit to a second deposition.

5. Whether the bankruptcy court erred in refusing to compel Rabkin to answer questions during his deposition based on the common interest privilege.

Appendix B

STANDARDS OF REVIEW

Whether a party is an insider in relation to a debtor is a question of fact reviewed for clear error. *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 67 (9th Cir. BAP 1991). In making this determination, the bankruptcy court must determine, "on a case-by-case basis whether the relationship between a creditor and its debtor, considered in the light of the statutory scheme, amounts to an 'insider' relationship." *Id.*

We review issues of statutory construction, including a bankruptcy court's interpretation of the Bankruptcy Code, *de novo. Samson v. W. Capital Partners, LLC (In re Blixseth)*, 684 F.3d 865, 869 (9th Cir. 2012). Construction and application of § 1129(a)(10) is reviewed *de novo. W. Real Estate Equities, LLC v. Vill. at Camp Bowie I, LP (In re Village at Camp Bowie I, LP)*, 710 F.3d 239, 2013 U.S. App. LEXIS 3949 * 17 (5th Cir. 2013).

We review good faith determinations under § 1126(e) for clear error. *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.)*, 118 F.3d 635, 638 (9th Cir. 1997).

The bankruptcy court's decisions resolving deposition disputes are reviewed for an abuse of discretion. *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004).

A trial court's application of the attorney-client privilege is reviewed *de novo. United States v. Richey*, 632 F.3d 559, 563-64 (9th Cir. 2012). The common interest

privilege is an extension of the attorney-client privilege. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012).

De novo review requires the Panel to review an issue independently, without giving deference to the bankruptcy court's conclusions. *First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir. 2006); *Cal. Franchise Tax Bd. v. Wilshire Courtyard (In re Wilshire Courtyard)*, 459 B.R. 416, 423 (9th Cir. BAP 2011).

Clear error is found when the reviewing court has a definite and firm conviction that a mistake has been committed. *Lewis v. Ayers*, 681 F.3d 992, 998 (9th Cir. 2012).

We apply a two-part test to determine objectively whether the bankruptcy court abused its discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(*en banc*). First, we "determine *de novo* whether the bankruptcy court identified the correct legal rule to apply to the relief requested." *Id.* Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. *Id.* at 1262 & n.20. We must affirm the bankruptcy court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Id.*

Appendix B

DISCUSSION

I.

Rabkin was neither a statutory nor a non-statutory insider of debtor Lakeridge under § 101(31).

The fundamental issue raised in this appeal is whether Rabkin was an "insider" as to Lakeridge. If he was an insider, his vote to accept the Lakeridge plan must be excluded under § 1129(a)(10).

The Bankruptcy Code definition of an insider in § 101(31) for a case involving a corporate debtor[8] provides:

> The term "insider" includes– . . .
>
> (B) if the debtor is a corporation—
>
> (I) director of the debtor;
>
> (ii) officer of the debtor;
>
> (iii) person in control of the debtor;
>
> (iv) partnership in which the debtor is a general partner;

8. The definition of "corporation" in the Bankruptcy Code includes unincorporated limited liability companies, such as Lakeridge. § 101(9)(A)(4); *In re Longview Aluminum, LLC*, 657 F.3d 507, 509 n.1 (7th Cir. 2011).

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor; . . .

(F) managing agent of the debtor.

If a word or phrase is defined in the statute, then that definition governs. *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 894 (9th Cir. 1992) (citing *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979)). A term appearing in several places in the statute is ordinarily interpreted as having the same meaning each time it appears. *Warfield v. Salazar (In re Salazar)*, 465 B.R. 875, 879-880 (9th Cir. BAP 2012) (citing *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)).

It is not disputed that Rabkin would not be included in any of the categories of insiders set forth expressly in § 101(31): he is not a director, officer, or a controlling party, relative of a controlling party, or a managing agent of Lakeridge. However, the statutory list of insiders is not exclusive. *See* 11 U.S.C. § 101(31) ("The term insider includes . . . ."); § 102(3) (explaining that, when used in the Code, the term "includes" is not limiting); *In re Bonner Mall P'ship*, 2 F.3d 899, 912 (9th Cir. 1993); *Miller Ave. Prof'l & Promotional Servs v. Brady (In re Enterprise Acquisition Partners, Inc.)*, 319 B.R. 626, 631 (9th Cir. BAP 2004) ("The definition of 'insider' in 11 U.S.C. § 101(31) is not limiting: the use of the word 'includes' is

indicative of Congress's intent not to limit the classification of insiders to the statutory definition."). In other words, Rabkin could be deemed an insider as to Lakeridge even if he did not fall into one of the classifications listed in the statute. The parties in this appeal and others sometimes refer to such parties as "non-statutory insiders."

A. The bankruptcy court did not err in determining that Rabkin was not a non-statutory insider of Lakeridge.

Because the Code's definition of an insider is not exclusive, courts must necessarily develop the factors that may render a party a non-statutory insider. As explained by the Panel, at bottom, this category includes those individuals or entities whose business or professional relationship with the debtor "compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *In re Friedman*, 126 B.R. at 70. Put another way, a non-statutory insider is one "who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." *Id.* (quoting S. Rep. No. 95-989, 95th Cong., 2nd Sess. 25 (1978) and H. R. Rep. No. 95-595, 95th Cong. 1st Sess. 312 (1977), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS, 1978, pp. 5787, 5810, 6269). In determining whether a creditor qualifies as a non-statutory insider, courts look at the closeness of the parties, and the degree to which the creditor is able to exert control or influence over the debtor. *In re Entm't*

Acquisition Partners, Inc., 319 B.R. at 626; *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586 (9th Cir. BAP 1987). The primary test of a non-statutory insider is whether the creditor "exercises such control or influence over the debtor as to render their transaction not arms-length." *Id.* In the context of debtor-creditor relations, "[a]n arm's-length transaction is '[a] transaction in good faith in the ordinary course of business by parties with independent interests. . . . The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction.'" *Anstine v. Carl Zeiss Meditec AG (In re U.S. Medical, Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) (quoting BLACK'S LAW DICTIONARY 109 (6th ed. 1990)).

Besides the control test and examination for an arms-length transaction, other courts have expanded the non-statutory insider group to include those with a close personal or romantic relationship with the debtor. *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (woman who was romantically involved with debtor considered an insider for stock transfer purposes); *In re Demko*, 264 B.R. 404, 408 (Bankr. W.D. Pa. 2001)(cohabitation may render individual an insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995)(live-in girlfriend may be insider); *but see In re Reinbold*, 182 B.R. 244, 246 (D. S.D. 1995) (holding that mere cohabitation is insufficient and that "a *de facto* or *de jure* family relationship is required.").

In sum, then, to find that a party is a non-statutory insider as to a debtor, the bankruptcy court must consider: (1) the closeness of the parties and the relative control each

has over the other, and (2) whether the degree of control is such that it would render its transaction with the debtor not arms-length.

Here, the bankruptcy court found that, despite his personal relationship with Bartlett, there was no control exerted by Rabkin over Lakeridge and/or Bartlett, and vice versa. Hr'g Tr. 77:25-78:6. The court also indicated in its comments on the record that it had reviewed the case law concerning personal relationships and determined that they would not support USB's argument that the relationship between Rabkin and Bartlett was such as to confer non-statutory insider status on Rabkin:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other's credit cards. They share each other's property. There was not any of that sort of activity in this case.

Hr'g Tr. 77:14-24.

The bankruptcy court heard testimony from Rabkin and Bartlett concerning Rabkin's motivations for purchasing the MBP Claim, the lack of control exerted by either Rabkin or Bartlett over each other's actions, and the nature of their relationship. The court concluded in its Designation Order:

> The court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things: (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabit with Ms. Bartlett and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett.

Designation Order at ¶ 2, August 20, 2012. As noted above, whether a party is an insider is a question of fact we review for clear error. The bankruptcy court's determination in this case was consistent with case law and supported by the testimony of the witnesses and other evidence presented at the hearing. While others might come to a different conclusion, where two permissible views of the evidence exist, the fact finder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

We conclude that the bankruptcy court did not clearly err in deciding that Rabkin was not a non-statutory insider as to Lakeridge. We therefore reject USB's contention in the cross appeal that Rabkin was a non-statutory insider and AFFIRM this portion of the bankruptcy court's decision.

B. The bankruptcy court erred in determining that, by acquiring MBP's insider claim, Rabkin also automatically became a statutory insider of Lakeridge.

As noted above, none of the parties asserted that Rabkin was a statutory insider of Lakeridge as specified in the statute, because he was clearly not a member of one of the enumerated categories in § 101(31)(B). Despite this, however, in its order, the bankruptcy court reasoned, "[b]ecause [MBP] is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim." Designation Order at § 6. In short, the bankruptcy court apparently ruled that, as a matter of law, a non-insider becomes a statutory insider automatically by acquiring an insider claim. In making this decision, the court did not rely upon any facts other than the existence of the assignment of Bartlett's claim to Rabkin.

The bankruptcy court's conclusion is not supported in the case law it cited for the proposition and, indeed, it is inconsistent with the Panel's published decisions. The Panel has on multiple occasions explained that "insider determination . . . is made on a case-by-case basis, after the consideration of various factors." *In re Friedman*, 126 B.R. at 70 (quoting *In re Schuman*, 81 B.R. at 586 n.1). That the inquiry as to insider status is fact-intensive, and made on a case-by-case basis, is generally supported in the case law. *Browning Interests v. Allison*, 955 F.2d 1008, 1011 (5th Cir. 1992) (holding that a non-statutory insider status must be determined by a factual inquiry into the Debtor's

relationship with the alleged insider); *Hyman v. Korshak & Assocs. (In re Island One, Inc.)*, 2013 Bankr. LEXIS 662 *6 (Bankr. M.D. Fla. 2013) ("This more nebulous 'non-statutory' insider status must be determined by a factual inquiry into the Debtor's relationship with the alleged insider. The determination is fact-intensive and must be made on a case-by-case basis."); *In re Velo Holdings*, 472 B.R. 201, 208 (Bankr. S.D.N.Y. 2012) (insider status can be "be determined on a case-by-case basis from the totality of the circumstances"). *Accord In re Smith*, 415 B.R. 222, 233 (Bankr. D. Haw. 2009); *Rainsdon v. Farson (In re Farson)*, 387 B.R. 784, 792 (Bankr. D. Idaho 2008).

Two of the three cases cited by the bankruptcy court in its ruling do not support its conclusion that when, by purchase or assignment, a non-insider acquires a claim from an insider, the new holder of the claim also assumes insider status. One case cited by the court, *In re Applegate Prop., Ltd.*, 133 B.R. 827 (Bankr. W.D. Tex. 1991) does not deal with the purchase of an insider claim by a non-insider. Instead, that case dealt with the purchase of a non-insider claim by an insider, as the result of which the bankruptcy court deemed the insider's acceptance of a plan excluded for purpose of voting under § 1129(a) (10) because the claimant was, independent of the claim, an insider. The other case cited by the bankruptcy court, *In re Holly Knoll P'ship*, 167 B.R. 381, 386 (Bankr. E.D. Pa. 1994), is nearly identical, in that it also dealt with an insider purchasing a non-insider claim. In that case, the court also conducted an inquiry that considered more than the simple transfer of the claim in examining the claimant's insider status. *Id.* at 798-99. As can be seen,

in both of these cases, the bankruptcy courts understood that the transfer or assignment of a claim did not alone change the status of the claimant, and that further inquiry was necessary to determine that status.

The one case cited by the bankruptcy court that partly supports its conclusion that a non-insider who acquires an insider claim "steps into the shoes of that claimant" is the unpublished decision of our Court of Appeals, *In re Greer W. Investment Ltd. P'ship*, 81 F.3d 168 [published in full-text format at 1996 U.S. App. LEXIS 8495], 1996 WL 134293 (9th Cir. Mar. 25, 1996). However, even this case does not tie the status of the claimant solely to the status of the claim he acquired. After agreeing with the bankruptcy court that the non-insider "assumed the claim subject to its insider status," the Ninth Circuit continued its analysis with "we next address whether [claimant] is an insider." 1996 U.S. App. LEXIS 8495, 1996 WL 134293 at *3. Upon further examination, the Ninth Circuit determined that the claimant was in fact an insider where the debtor exercised considerable control over the creditor or vice versa. We take both of these observations to mean that the assignment or purchase of a claim does not by itself change the insider status of the claimant without further inquiry and factual findings to support designating a creditor as an insider.

There is also a logical and legal inconsistency in the bankruptcy court's reasoning that the assignment of a claim by itself may change the insider status of the claimant. If assignment of an insider claim to a non-insider alone changes the non-insider's status to insider, then it

would follow that an assignment or purchase of a non-insider claim by an insider would change the insider into a non-insider. As both the *Applegate* and *Holly Knoll* courts observed, that cannot be allowed because, both before and after the assignment, the insider is still an insider.

The bankruptcy court applied an erroneous legal rule in this case when it determined that Rabkin, who was otherwise a non-insider, became an insider in the Lakeridge bankruptcy case by merely purchasing an insider's claim. This portion of the bankruptcy court's decision is therefore REVERSED.

II.

Since the bankruptcy court failed to make appropriate findings regarding the insider status of Rabkin, it was error to exclude Rabkin's acceptance of the plan of reorganization under § 1129(a)(10).

Section 1129 provides the requirements for confirmation of a chapter 11 plan of reorganization. Of interest in this appeal is one such requirement, § 1129(a)(10). This provision dictates that, if a chapter 11 plan proposes to impair a class or classes of claims, to be confirmed at least one impaired class must affirmatively accept the plan, and that class acceptance must be determined without including the "acceptance of the plan by any insider."[9]

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9. Section 1129 provides "(a) The court shall confirm a plan only if all of the following requirements are met: . . . (10) If a class of claims is impaired under the plan, at least one class of claims that is

In this case, Lakeridge has just two creditors. Its proposed plan separately classified each creditor: Class 1 for secured creditor USB and Class 3 for Rabkin, the sole unsecured creditor. Because the plan does not provide for full payment to Class 3 creditors, that class is impaired. § 1124(1) (providing that a class is impaired unless, as to each claim in the class, the plan leaves unaltered the contractual rights of the claim). According to a ballot summary submitted to the bankruptcy court on July 30, 2012 by Lakeridge's counsel, Class 1 (USB) voted to reject the plan. However, Class 3 (Rabkin) voted to accept the plan.[10] Thus, if Rabkin's accepting vote is counted, Class 3 has accepted the plan, and Lakeridge has satisfied § 1129(a)(10).

Since the bankruptcy court determined that Rabkin was an insider, though, his vote would necessarily be excluded in determining whether Class 3 had accepted the plan. We conclude the bankruptcy court's decision that his vote must be excluded was incorrect because Rabkin was not an insider, and § 1129(a)(10) does not require

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impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

10. At oral argument before the Panel, counsel for USB suggested that Rabkin placed a condition on his accepting vote, "that he receive more money." We have examined the record and find no support for this allegation. Indeed, a copy of Rabkin's ballot is included in the bankruptcy docket at no. 240, Exhibit B, attached to Lakeridge's Certificate of Acceptance and Rejection of Chapter 11 Plan [Ballot Summary]. The ballot contains only a check mark after "accepts" and is signed by Rabkin with his address. There are no indications of a condition on the ballot.

that his acceptance of the Lakeridge plan be excluded in determining whether Class 3 accepted that plan.[11] We therefore REVERSE that portion of the bankruptcy court's order determining that Rabkin's vote to accept the plan must be excluded.

III.

The bankruptcy court did not err in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e).

Even if Rabkin is not an insider and his claim is not excluded under § 1129(a)(10), USB argues that his acceptance of the Lakeridge plan should be "designated" under § 1126(e). That Code provision permits the bankruptcy court, on request of a party in interest, to disqualify any plan vote that was not made in good faith, or that was not solicited in good faith or in accordance with

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11. A leading treatise has described the test under § 1129(a)(10) as "somewhat mechanical on its face, and thus would not under a plain meaning analysis permit an inquiry into motive" of the accepting creditor. 7 COLLIER ON BANKRUPTCY § 1129.02[10] (Alan N. Resnick & Henry J. Somer, eds. 16th ed. 2009). Some courts have suggested that attempts to artificially manufacture classes to obtain an accepting impaired non-insider class raise questions under § 1129(a)(10). *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs)*, 7 F.3d 127, 132 (8th Cir. 1993). We decline to import an intent or purpose requirement into § 1129(a)(10). *In re Hotel Assocs. of Tucson*, 165 B.R. at 474. However, we note that, in § 1129(a)(3), the Code also requires, as a condition of confirmation, that the plan proponent prove that the plan has been proposed in good faith.

the provisions of the Bankruptcy Code.[12] The bankruptcy court declined to designate Rabkin's acceptance here, and we perceive no error in this decision.

In this context, "good faith" does not require a creditor to act with selfless disinterest:

> If a person seeks to secure some untoward advantage over other creditors for some ulterior motive, that will indicate bad faith. *See In re Marin Town Ctr.*, 142 B.R. 374, 378-79 (N.D. Cal. 1992). But that does not mean that creditors are expected to approach reorganization plan votes with a high degree of altruism and with the desire to help the debtor and their fellow creditors. Far from it.

In re Figter Ltd., 118 F.3d at 638-39. Put another way, a creditor acting out of self-interest "is not to be condemned simply because it frustrated [some other creditor's] desires." *Id.* at 639. On the other hand, if a person seeks to secure some untoward advantage over other creditors for some ulterior motive, that will indicate bad faith for purposes of § 1126(e). *Id.* at 639.

Rabkin testified that he purchased the MBP Claim as a business investment with the expectation of receiving

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12. "On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." § 1126(e).

a $30,000 return through the Lakeridge plan on a $5,000 investment. Rabkin Dep. 82:3-14. USB contends that Rabkin was involved in a romantic relationship with Bartlett, a principal of Lakeridge, and conspired with her to acquire the MBP claim solely to accept Lakeridge's plan of reorganization. On the one hand, Rabkin's argument that he was interested in making money is not an example of bad faith. *In re Figter*, 118 F.3d at 638. On the other hand, the acquisition of a claim solely to create an impaired assenting class may constitute bad faith under § 1129(a)(3). *In re Hotel Assocs. Of Tucson*, 165 B.R. 470, 475 (9th Cir. BAP 1994).

USB insists that Rabkin did not act in accordance with his financial interests, and as evidence, it points to his deposition where counsel for USB offered Rabkin $50,000, and then $60,000, to acquire his claim, which would generate an immediate profit of $20,000-30,000 above what Rabkin expected to gain through the plan. According to USB, Rabkin's refusal to take the bait clearly demonstrated his motive in the case was something other than financial gain. When a creditor appears to act against self-interest, that may be an indication of bad faith. *In re Hotel Assocs. Of Tucson*, 165 B.R. at 475.

The bankruptcy court addressed this argument both at the hearing on August 29, 2012, and in the order denying USB's motions. At the hearing, Rabkin expressed outrage that he was pressured to make a deal in the context of a deposition hearing. The court agreed that USB's tactic was "appalling" and apologized "on behalf of the legal profession" for USB's counsel's behavior. Hr'g Tr. 21:1-2.

In the order, the court characterized USB's ploy during the deposition as "offensive" and noted that Rabkin was under no obligation to accept the offer. Designation Order at ¶ 3. The court also decided in the order that Rabkin's purchase of a $2,671,000.00 unsecured claim under these circumstances for $5,000, with a $30,000 expected gain, was an example of a speculative investment and that no special due diligence was required by Rabkin. *Id.*

As to USB's arguments concerning the Rabkin-Bartlett personal relationship, the bankruptcy court made several findings on the record, discussed above, indicating that the evidence presented to him did not support insider standing on the basis of a putative romantic relationship between Rabkin and Bartlett. Designation Order at ¶ 2. In addition, in the order, the court found that, on the evidence before it, "Ms. Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's Plan." Designation Order at ¶ 3(c). In general, bad faith solicitation of a vote requires a "specific request" for a creditor's official vote. *In re Bataa/Kierland, LLC*, 476 B.R. 558, 565 (Bankr. D. Ariz. 2012) (citing *Century Glove v. First Am. Bank of New York*, 860 F.2d 94, 102-03 (3d Cir. 1988).

Whether Rabkin's vote on the Lakeridege plan should be designated as "not in good faith" under § 1126(e) is a question of fact reviewed for clear error. *In re Figter*, 118 F.3d at 638. The bankruptcy court considered the testimony and evidence on this question and made adequate findings on the record and in the order to support its conclusions. *Anderson*, 470 U.S. at 573-74 (Where two permissible views of the evidence exist, the fact finder's

choice between them cannot be clearly erroneous.). The bankruptcy court did not clearly err in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e). We AFFIRM the bankruptcy court's decision in this respect.

IV.

The bankruptcy court did not abuse its discretion in refusing to order that Bartlett submit to a second deposition.

Rules 9014 and 7030 incorporate Civil Rule 30 in contested matters. Civil Rule 30 states, "Unless otherwise stipulated or ordered by the Court, a deposition is limited to 1 day of 7 hours." Civil Rule 26, also incorporated in this context by Rules 9014 and 7026, provides in relevant part,

> When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (I) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Civil Rule 26(b)(2)(C).

USB contends that Bartlett was originally deposed only in her capacity as representative of Lakeridge, and not in her personal capacity. Lakeridge and Rabkin counter that USB did indeed have the opportunity in the first deposition to question Bartlett about personal matters, including her relationship with Rabkin. At the hearing on June 12, 2012, the bankruptcy court declined to order Bartlett to appear at a second deposition because USB already had the opportunity to question Bartlett in the deposition on personal matters as part of an "extensive" discussion. The record on appeal supports this conclusion:

> Q: When was that [MBP Claim] transferred to Mr. Rabkin?
>
> BARTLETT: I believe it was in October. October 17th, something like that. In 2011.
>
> Q: And . . . that's after the Village filed for bankruptcy?
>
> BARTLETT: Yes.

Q. The most recent time?

BARTLETT: Yes. . . .

Q. Okay. Did you know Mr. Rabkin before?

BARTLETT: I did. . . .

Q: Did you know him personally? Were you guys friends?

BARTLETT: Yes.

Bartlett Dep. 55:14-20, February 9, 2012.

The bankruptcy court's ruling that USB had ample opportunity to obtain the information it needed at the original deposition is consistent with Civil Rules 30 and 26, and is not (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. The bankruptcy court did not abuse its discretion in refusing to order that Bartlett submit to a second deposition.

V.

The bankruptcy court made insufficient findings in support of its ruling concerning the application of the common interest privilege.

Whether the bankruptcy court correctly determined that the common interest privilege applied to protect

Rabkin's discussions with Lakeridge's attorney is an issue of law we review *de novo*. *Richey*, 632 F.3d at 563-64; *Gonzalez*, 669 F.3d at 978.

The bankruptcy court announced its decision on the record of the hearing on June 21 regarding the Discovery Requests, including its ruling that the common interest privilege applied and Rabkin was not required to respond to questions from USB's counsel about his discussions with Lakeridge's lawyer. The bankruptcy court was apparently unaware that the Ninth Circuit had just issued a published opinion relating to the common interest privilege a few weeks earlier, on May 10, 2012, in *Pac. Pictures Corp. v. U.S. Dist. Ct.*, 679 F.3d 1121 (9th Cir. 2012).

The Common Interest Privilege (also known as Joint Defense Privilege) has long been recognized in the Ninth Circuit. *Gonzalez*, 669 F.3d at 978 (9th Cir. 2012); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964). The bankruptcy court relied on *Gonzalez* in which the Ninth Circuit held that the privilege was applicable in both civil and criminal proceedings, and was based on the principle that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *Gonzalez*, 669 F.3d at 978. This privilege applies in bankruptcy proceedings. *In re Mortg. & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997). The privilege does not require a written agreement, and its application may be implied by "conduct and situation." *Gonzalez*, 669 F.3d at 978 (quoting *Continental Oil*, 330 F.2d at 350).

Appendix B

The bankruptcy court received a letter from Rabkin's attorney describing the nature and scope of the communications at issue:

> In advance of his [scheduled] Deposition, Rabkin and [his counsel] met with [Lakeridge's counsel at their office] to discuss in general terms the types of questions to expect at the deposition. The meeting lasted for 40 minutes and Rabkin anticipated that the discussions were being held in confidence. Later, at the deposition, counsel for lender [USB] asked deponent Rabkin what had been discussed at the meeting []. Smith and Hartman each asserted the common interest privilege and Hartman directed Rabkin not to answer any questions relating to the meeting at [Lakeridge Counsel's Office].

Lakeridge and Rabkin shared a common interest in that they both wanted to obtain confirmation of the plan of reorganization, Lakeridge as the debtor and plan proponent, and Rabkin for his financial interests. As a result, while they had separate counsel, they were engaged in furtherance of a common legal enterprise. *Gonzalez*, 669 F.3d at 981 ("In the context of the joint defense privilege, only communications made in course of ongoing common enterprise and intended to further that enterprise are protected."). Rabkin believed that his communications with Lakeridge's attorney were protected as confidential, and asserted the common interest privilege before the bankruptcy court. *Gonzalez*, 669 F.3d at 981 ("The common interest rule requires communication to be given

in confidence and that the client reasonably understood it to be so given.").

The bankruptcy court noted that "I believe there is a Common Interest Privilege. I believe the Ninth Circuit has defined it. . . So your motion is denied." Hr'g Tr. 9:7-11, June 21, 2012.

However, because the bankruptcy court was not aware of the newer, *Pac. Pictures* opinion, it did not make the necessary finding that, in addition to all the factors discussed above, it was necessary to determine if there was an express or implied agreement between the parties to pursue a joint strategy:

> Rather than a separate privilege, the "common interest" or "joint defense" rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); *see also In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (collecting cases). However, a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. *Id. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement — whether written or unwritten. Cf. Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

Pac. Pictures Corp., 679 F.3d at 1130 (emphasis added).

Because the bankruptcy court did not make the necessary finding that, in addition to sharing a common interest in the outcome of the litigation, an express or implied agreement existed between Rabkin and Lakeridge to pursue a joint strategy, we must VACATE that portion of the order denying the Discovery Requests relating to the common interest privilege.

CONCLUSION

We AFFIRM that part of the bankruptcy court's order denying the Discovery Requests that Bartlett need not submit to a second deposition. We VACATE the part of that order that the common interest privilege applied to Rabkin's discussions with Lakeridge's attorney.

As to the Designation Order, we AFFIRM the bankruptcy court's decision that Rabkin is not a non-statutory insider, and AFFIRM its decision declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e). We REVERSE the bankruptcy court's decision that Rabkin is a statutory insider, and REVERSE the decision excluding Rabkin's vote to accept the plan. We VACATE that part of the order deciding that the Debtor does not have an impaired, assenting class of claims necessary to confirm the plan, and the decision denying confirmation of the Lakeridge plan of reorganization. We REMAND these matters to the bankruptcy court for further proceedings consistent with this decision.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT, DISTRICT OF NEVADA, DATED AUGUST 20, 2012

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. 11-51994-BTB

Chapter 11

In re:

THE VILLAGE AT LAKERIDGE, LLC
AKA MAGNOLIA VILLAGE, LLC,

Debtor.

ORDER GRANTING U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS INSIDER CLAIM AND (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES

Date: August 1, 2012

Time: 10:00 a.m.

Place: Courtroom 2
300 Booth Street
Reno, NV 89509

On July 1, 2012, U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America,

N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3, by and through, CWCapital Asset Management LLC, solely in its capacity as Special Servicer (hereinafter referred to as "*Lender*"), filed a motion to designate the claim of Dr. Robert Rabkin as an insider claim, and to disallow the claim for voting purposes (Ct. Dkt. #194) (the "*Motion*"), along with the Declaration of Keith C. Owens in Support thereof (Ct. Dkt. #198). Among other things, the Motion sought to designate Dr. Rabkin's claim as an insider claim and to disallow his claim for voting purposes because: (a) the insider claim assigned to Dr. Rabkin did not lose its status as an "insider claim" simply because the claim was assigned to Dr. Rabkin after the bankruptcy filing; (b) Dr. Rabkin is a non-statutory insider for purposes of 11 U.S.C. § 101(31), and therefore, the claim should be designated as an insider claim, and Dr. Rabkin's vote in favor of the Debtor's Plan of Reorganization (Ct. Dkt. 48) as modified by the Second Amendment To Debtor's Plan Of Reorganization (Ct. Dkt. 109) (collectively the "*Plan*") cannot be counted; and (c) Dr. Rabkin's vote should not be considered and the Plan should not be confirmed because the assignment of the insider claim to Dr. Rabkin was made in bad faith, and solely to create an impaired, consenting class for purposes of cramdown.

The Debtor filed an opposition to the Motion (Ct. Dkt. #213) and the Declaration of Robert Rabkin in support thereof (Ct. Dkt. #214), and the Lender filed a reply to the

opposition (Ct. Dkt. #218). Although Dr. Rabkin provided a declaration in support of Debtor's opposition, he did not file his own response or reply to the Motion.

Concurrently with the filing of the Motion, Lender filed an application for order shortening time (the "*Application*") to schedule a hearing on shortened notice prior to the plan confirmation hearing scheduled for August 1, 2012 (Ct. Dkt. #195-97). The Court granted the Application, and scheduled a hearing thereon on July 19, 2012 (Ct. Dkt. #202). On July 18, 2012, the Court advised the parties that the hearing on July 19, 2012, would be used as a status and scheduling conference pursuant to Local Rule 9014(a)(6). The parties appeared as scheduled on July 19, 2012. The Court scheduled an evidentiary hearing on the Motion for the date previously scheduled for the confirmation hearing, August 1, 2012, at 10:00 a.m. The Court also rescheduled the confirmation hearing to September 26, 2012, at 10:00 a.m.

At the hearing on July 19, 2012, the Court granted the Lender's oral request to submit supplemental authority arising from Judge Zive's decision that day on the allowance or designation of claims in *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev. July 19, 2012). In permitting the filing of supplemental authority, the Court ordered that the parties could not file additional briefs on the Motion.

On July 23, 2012, the Lender filed a notice of supplemental authority as permitted by the Court (Ct. Dkt. #228). On July 30, 2012, the Debtor filed a supplemental brief in opposition to the Motion (Ct. Dkt. #243).

Appendix C

On July 30, 2012, in addition to the evidence filed by the Lender in support of its Motion, the Lender lodged 17 exhibits with the Court for the hearing pursuant to Local Rule 9017(d), including the following: (1) the transcript of Dr. Rabkin's deposition taken on June 7, 2012 (Ct. Dkt. #198, Ex. 1); (2) the notice of rescheduled deposition of Dr. Rabkin and production of documents; (3) a letter from Jeffrey L. Hartman dated May 23, 2012, in response to the request for production of documents, attaching the assignment of creditor MBP Equity Partners I, LLC's claim and a copy of a cancelled check from Dr. Rabkin to MPB Equity Partners I, LLC, in the amount of $5,000; (4) the notice of assignment of claim from MPB Equity Partners I, LLC to Dr. Rabkin (Ct. Dkt. #78); (5) Debtor's Schedule F (Ct. Dkt. #1); (6) Debtor's plan of reorganization filed September 14, 2011 (Ct. Dkt. #48) (the "*Plan*"); (7) the first amendment to the Plan filed on November 4, 2011 (Ct. Dkt. #76); (8) the second amendment to Plan filed on January 12, 2012 (Ct. Dkt. #109); (9) the offer dated June 7, 2012, from CWCapital Asset Management to Dr. Rabkin to purchase the claim (Ct. Dkt. #198, Ex. 2); (10) the deposition transcript of the Debtor taken February 9, 2012; (11) Memorandum amending and clarifying oral findings and conclusions, *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev., Ct. Dkt. #320, filed July 20, 2012) (Ct. Dkt. #228, Ex. 1); (12) Transcript, July 19, 2012, *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev., Ct. Dkt. #321, filed July 20, 2012) (Ct. Dkt. #228, Ex. 2); (13), Order, *In re Caviata Attached Homes, LLC*, Case No. BK-N-09-52786-GWZ, 2010 WL 8500043 (Bankr. D. Nev. April 12, 2010) (Ct. Dkt. #228, Ex. 3); (14) Petition, schedules, and statement of financial affairs filed June 16,

2011 (Ct. Dkt. #1); (15) Debtor's first amended disclosure statement filed November 16, 2011 (Ct. Dkt. #82); (16) Claims Register; and (17) Amended Proof of Claim No. 1 filed by the Lender on January 13, 2012.

The Court held an evidentiary hearing on the Motion (the "*Hearing*") on August 1, 2012, at 10:00 a.m., the Hon. Bruce T. Beesley presiding. Alan R. Smith, Esq., and Holly E. Estes, Esq., of the Law Offices of Alan R. Smith appeared on behalf of the Debtor. Ms. Kathie Bartlett, a member of the Board of Managers of MBP Equity Partners 1, LLC, which is the owner and managing member of the Debtor, also appeared at the Hearing; Louis M. Bubala III, Esq., of Armstrong Teasdale, LLP, and Keith C. Owens, Esq., and Ben D. Whitwell, Esq., of Venable LLP, appeared on behalf of the Lender; and Jeffrey L. Hartman, Esq., of Hartman & Hartman, appeared on behalf of Dr. Robert Rabkin. Dr. Rabkin also appeared at the Hearing.

Dr. Rabkin was sworn in and examined by Debtor's counsel, cross-examined by the Lender's counsel, and examined by the Court. Ms. Bartlett then was sworn in and examined by Debtor's counsel, cross-examined by the Lender's counsel, and examined by the Court. Dr. Rabkin's counsel did not examine either witness, but provided an explanatory statement after the examinations. Following those examinations, argument was presented by counsel for the Debtor and the Lender. Dr. Rabkin's counsel did not provide any argument.

The Court, having reviewed and considered all of the papers filed in support of and in opposition to the Motion, the evidence presented by the parties prior to and at

the time of the Hearing including, without limitation, the testimony of Dr. Rabkin and Ms. Bartlett, and the arguments of counsel; the Court, having found that notice of the Motion and of the Hearing was sufficient and proper under the circumstances, and that no further notice is required; the Court, having stated its Findings of Fact and Conclusions of Law (collectively, the "*Findings*") orally on the record pursuant to Federal Rule of Bankruptcy Procedure 9014 and Federal Rule of Bankruptcy Procedure 7052, incorporating by reference Federal Rule of Civil Procedure 52, which Findings are hereby incorporated into this Order as though fully set forth herein;[1]

THE COURT HEREBY ORDERS, FINDS AND DECREES AS FOLLOWS:

1. The Motion is granted in part and denied in part

2. The Court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things, (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay Mr. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

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1. Any Findings of Fact that are Conclusions of Law shall be treated as such, and any Conclusions of Law that are Findings of Fact shall be treated as such.

3. The Court finds and concludes that MBP Equity Partners 1, LLC's insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class for purposes of cramdown because, among other things, (a) despite Lender's offensive offer to purchase his claim during Dr. Rabkin's deposition for twice as much as Dr. Rabkin could recover under the Debtor's Plan, Dr. Rabkin was not required to sell his claim to the Lender, (b) Dr. Rabkin's not having conducted extensive due diligence as to how such claim would be treated under the Debtor's Plan, was not dispositive of bad faith because Dr. Rabkin's purchase of the MBP Equity Partners 1, LLC claim in the amount of $2,671,000.00 for $5,000.00 was a speculative investment and the due diligence conducted was sufficient under the circumstances, and (c) Ms. Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's Plan.

4. However, the Court finds and concludes as a matter of law that MBP Equity Partners 1, LLC, is a statutory insider of the Debtor as defined by 11 U.S.C. § 101(31).

5. Dr. Rabkin acquired the claim of MBP Equity Partners 1, LLC (Ct. Dkt. #78) after the Debtor's bankruptcy filing.

6. Because MBP Equity Partners 1, LLC, is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim. *See e.g., In re Applegate Prop., Ltd.*, 133 B.R. 827 (Bankr. W.D. Texas 1991); *In re Holly Knoll P'ship*, 167 B.R. 381 (Bankr. E.D. Penn. 1994); *and In re Greer W. Inv. L.P.*, 81 F.3d 168, 1996 U.S. App. LEXIS 8495, 1996 WL 134293 (9th Cir. March 25, 1996) (table).

7. The Plan contained two impaired classes of claims, consisting of (1) the claim of MBP Equity Partners 1, LLC, transferred to Dr. Rabkin; and (2) the claim of the Lender (Ct. Dkt. #240, Ballot Summary). Dr. Rabkin voted in favor of the Plan, while the Lender voted against the Plan (Ct. Dkt. #240).

8. Dr. Rabkin's vote to accept the Plan cannot be considered to determine acceptance of the Plan by an impaired class of claims pursuant to 11 U.S.C. § 1129(a)(10). *See In re Holly Knoll P'ship*, 167 B.R. 381, 385 (Bankr. E.D. Pa. 1994); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991); *Matter of Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988).

9. Because Dr. Rabkin's vote cannot be considered for voting purposes in order to confirm the Debtor's Plan, the Debtor does not have an impaired, assenting class of claims necessary to confirm its Plan.

10. Because the Plan cannot be confirmed as a matter of law, confirmation of the Plan is hereby **DENIED,** and the Plan confirmation hearing currently scheduled for September 26, 2012, at 10:00 a.m. is hereby **VACATED.**

11. If the Debtor intends to pursue an amended plan of reorganization, the Debtor shall be required to file an amended plan of reorganization and disclosure statement not later than 30 days from the date of the hearing of this Motion (*i.e.*, on or before August 31, 2012).

12. If the Debtor files an amended plan of reorganization and disclosure statement on or before August 31, 2012, the

Court shall conduct a hearing on the disclosure statement on September 26, 2012, at 10:00 a.m. To the extent necessary, the Court hereby shortens the necessary time for notice and a hearing as permitted by Federal Rule of Bankruptcy Procedure 9006 and Local Rule 9006. The briefing schedule shall be controlled by Local Rule 9014.

13. The Court also shall conduct the continued hearing on the Lender's Motion for Relief From Automatic Stay to Foreclose on Debtors Property (Ct. Dkt. #26) (the "*Motion for Relief from Stay*"), and the Debtor's Motion for Authority to Use Cash Collateral (Ct. Dkt. # 17) (the "*Cash Collateral Motion*"), on September 26, 2012, at 10:00 a.m.

IT IS SO ORDERED.

# # #

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

__ The court has waived the requirement set forth in LR 9021(b)(1).

__ No party appeared at the hearing or filed an objection to the motion.

__ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and

each has approved or disapproved the order, or failed to respond, as indicated below:

A. Smith/*H. Estes* (Debtor) Delivered Via Email, 8/16/12 **Approve**/Disapprove

J. Hartman/I. Quddus (Dr. Rabkin) Delivered Via Email, 8/16/12 **Approve**/Disapprove

__I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

ARMSTRONG TEASDALE LLP

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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 16, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-60038
BAP No. 12-1456

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY AND THROUGH CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Appendix D

No. 13-60039
BAP No. 12-1474

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY AND
THROUGH CWCAPITAL ASSET MANAGEMENT LLC,
SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

ORDER

Before: CLIFTON and N.R. SMITH, Circuit Judges and LASNIK,* Senior District Judge.

---

* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

Appendix D

Judge N.R. Smith has voted to deny the petition for rehearing *en banc*, and Judge Lasnik has so recommended. Judge Clifton has voted to grant the petition for rehearing *en banc*.

The full court was advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.

ECORD
AND
BRIEF,

Supreme Court, U.S.
FILED
AUG 15 2016

No. 15-1509

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, *et al.*,
Petitioners,

v.

THE VILLAGE AT LAKERIDGE, LLC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners present four questions in support of their Petition:

1. Does the Ninth Circuit's decision create a split of authority among the circuits regarding the proper test to be employed to determine non-statutory insider basis?

2. Is the finding by the Ninth Circuit that the assignee of an insider claim is not automatically an insider an important decision warranting certiorari?

3. Does the Ninth Circuit's decision create a split of authority among the circuits that the assignee of an insider claim does not automatically remain the holder on an insider claim.

4. Is the Ninth Circuit's decision regarding the above an "important decision" warranting certiorari?

STATEMENT OF CORPORATE DISCLOSURE

In accordance with United States Supreme Court Rule 29.6, Respondent Village At Lakeridge, LLC discloses that it is wholly owned by MBP Equity Partner's 1, LLC, which is a privately held limited liability company in Nevada.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF CORPORATE DISCLOSURE . . ii

TABLE OF AUTHORITIES v

DEFINITIONS APPLICABLE TO THIS BRIEF . vii

STATEMENT OF THE CASE 1

I. Background 1

A. The Bankruptcy Court Decision 1

B. The Decision Of The Ninth Circuit Bankruptcy Appellate Panel. 2

C. The Decision By The Ninth Circuit 3

GROUNDS FOR CERTIORARI 4

REASONS FOR DENYING THE PETITION 6

I. There Is No Split Of Authority Among The Circuits Regarding The Proper Test To Be Employed To Determine Non-Statutory Insider Status. 6

A. The Panel Employed the Proper Legal Standard for Determining Whether A Person Is a Non-Statutory Insider. 7

B. The Decision Did Not Create a Split Among The Circuits Regarding The Correct Standard Of Review For Determining Non-Statutory Insider Status. 9

C. The Panel's Decision Did Not Create A Split Of Authority As To The Applicable Standard Of Review Regarding Non-Statutory Insider Status. 11

II. Just Being An "Important" Decision Does Not Warrant Certiorari. 11

A. The Bank Exaggerates And Misrepresents The Panel's Decision. 11

B. The Panel's Decision Regarding Assignments Does Not Conflict With Other Circuits. 12

C. General Assignment Law Does Not Apply. . 14

D. The Assignment Issue Does Not Warrant Granting The Petition. 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

In re: Applegate Prop., Ltd.,
133 B.R. 827 (Bankr. W. D. Texas (1991) 13

In re: Cellnet Data Systems, Inc.,
327 F.3d 242 (3rd Cir. 2003) 10

In The Matter of Fabricators, Inc.,
926 F.2d 1458 (5th Cir. 1991) 10

In re: Holly Knoll Partnership,
167 B.R. 381 (Bankr. E. D. Pa. 1994) 13

In re: Longview Aluminum, LLC,
657 F.3d 507 (7th Cir. 2011) 7, 8

Pac. Pictures Corp. v. US District Ct.,
679 F.3d 1121 (9th Cir. 2012) 2

In re The Village At Lakeridge, LLC,
814 F.3d 993 (9th Cir. 2016) ..... *passim*

In re: U.S. Medical, Inc.,
531 F.3d 1272 (10th Cir. 2008) 7

In re: Windstar Communications, Inc.,
545 F.3d 382 (3rd Cir. 2009) 10

STATUTES

11 U.S.C. § 101(31) 3, 7, 8, 9

11 U.S.C. § 1129(a)(10) 1, 2

RULES

Sup. Ct. R. 10 ..... *passim*

OTHER AUTHORITIES

S.Rep.N. 989, 95th Cong. Sess., reprinted in 1978 U.S.C.A. N 5787 8

DEFINITIONS APPLICABLE TO THIS BRIEF

"Petition"	shall mean the Petition For A Writ Of Certiorari filed by the Bank.
"BAP Opinion"	shall mean the Memorandum Of The United States Bankruptcy Appellate Panel Of The Ninth Circuit, filed April 5, 2015, in the case of The Village At Lakeridge, LLC., a copy of which is attached as Appendix B to the Petition. References to page numbers are to the number identified in the appendix.
"9th Cir. Opinion" or "Panel Decision"	shall mean the decision of the Ninth Circuit Court Of Appeals in the case In re The Village At Lakeridge, LLC, 814 F.3d 993 (9th Cir. 2016).
"Ninth Circuit" or "Panel"	shall mean the Ninth Circuit Court of Appeals, and the panel of judges who issued the decision.
"Supreme Court"	shall mean the Supreme Court of The United States.
"Rabkin"	shall mean Robert Rabkin.
"Bank"	shall mean the Petitioner.

"Debtor" or "Lakeridge"	shall mean the Respondent, The Village At Lakeridge, LLC.

STATEMENT OF THE CASE

I. Background

A. The Bankruptcy Court Decision

This case involves the confirmation of the Debtor's First Amended Plan of Reorganization (the "Plan") proposed in the bankruptcy case of The Village at Lakeridge, LLC (hereinafter "Debtor" or "Respondent"). Confirmation of the Plan was opposed by U.S. Bank National Association, As Trustee, As Successor-In-Interest To Bank of America, N.A., As Trustee, As Successor By Merger To LaSalle Bank National Association, As Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), By and Through, CWCaptial Assets Management LLC ("CWCAM"). CWCAM is an alleged Special Servicer for the Trust (hereinafter "Bank" or "Petitioner"). A claim against the Debtor held by MBP Equity Partner's 1, LLC ("MBP"), the Debtor's sole member, was sold to Rabkin. Rabkin voted in favor of the Plan, and was asserted by the Debtor as the accepting class under 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code. The Bank misstates the facts in the Petition stating that the claim was purchased from Rabkin's "girlfriend." *See* Petition, p.3. The claim amount was $2.76 million, and the purchase price was $5,000.00. The bankruptcy court denied confirmation of the Plan on the basis that § 1129(a)(10) of the Bankruptcy Code had not been satisfied. Specifically, the bankruptcy court held that Rabkin's claim, having been purchased from an insider, remained an insider claim, and therefore the requirements of § 1129(a)(10)

had not been met. However, the bankruptcy court also concluded, following consideration of all the testimony, that Rabkin was not an non-statutory insider, and that there was no bad faith in the transaction.

The Debtor appealed the bankruptcy court's decision to the Ninth Circuit Bankruptcy Appellate Panel.

B. The Decision Of The Ninth Circuit Bankruptcy Appellate Panel.

On April 5, 2013, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's holding that Rabkin's vote could not be counted for the purpose of accepting the plan under § 1129(a)(10). However, the BAP also considered whether or not the common interest privilege applied to a conversation between counsel for Rabkin and counsel for the Debtor (see BAP Opinion, pages 56(a) through 60(a)). Specifically, Rabkin's counsel met with Debtor's counsel prior to the deposition of Rabkin to discuss the upcoming deposition. Both counsel asserted the common interest privilege at the time of Rabkin's deposition. The bankruptcy court confirmed that there was a common interest privilege, and prohibited inquiry into the conversation. However, the BAP noted that the bankruptcy court was apparently unaware that the Ninth Circuit had just issued a published opinion relating to the common interest privilege a few weeks earlier. *See* Pac. Pictures Corp. v. US District Ct., 679 F.3d 1121 (9th Cir. 2012). Based upon the Pac. Pictures Corp. decision, the BAP determined that the bankruptcy court did not make the necessary finding of whether or not there was an express or implied agreement between the parties to

pursue a joint strategy. *See* BAP Opinion, p.60a. Accordingly, the BAP vacated the portion of the decision regarding the discovery requests alleged to be protected by the common interest privilege, and remanded the matter to the bankruptcy court for further proceedings. Despite being given an opportunity to conduct further discovery on the relationship between Rabkin and the Debtor, the Bank took no action whatsoever, and instead appealed to the Ninth Circuit. The failure of the Bank to conduct additional discovery directly relates to the Bank's complaint that the bankruptcy court's factual conclusions were incorrect, or that the Panel failed to use the appropriate standard to review the factual findings of the bankruptcy court. The Bank should not be heard to complain about the factual findings of the bankruptcy court when it intentionally failed to conduct the additional discovery that was allowed by the BAP.

C. The Decision By The Ninth Circuit

The Ninth Circuit issued its published decision affirming the BAP's ruling on February 9, 2016. The Panel found that:

A. A third party does not become an insider as a matter of law by acquiring a claim form an insider.
B. Insider status pertains only to the claimant, it is not the property of a claim, and therefore general assignment law does not apply.
C. Rabkin was not a non-statutory insider because the closeness of relationship with the Debtor was not comparable to those factors enumerated in § 101(31) of the Bankruptcy Code, and the

relevant transaction was negotiated at arms length. Contrary to the statements of the Bank, the Panel did not create a "new test" for determining whether or not the purchaser of a claim is a non-statutory insider.

GROUNDS FOR CERTIORARI

The grounds for granting a writ of certiorari are set forth in Supreme Court Rule 10 which provides (in part):

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal questions in a way that conflicts with a decision by a state court of last resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) (omitted as not relevant in this case);
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been,

> but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Supreme Court is not simply the next level of appeal from the Ninth Circuit. A split of opinion among the circuits on an important question is the premier criterion used by the Supreme Court to decide whether to grant certiorari. The conflict within the circuits must be intolerable and current. As discussed below, in this case there is no conflict among the lower federal courts regarding any of the issues relevant to this case, let alone one that is important or intolerable. As stated in Rule 10, a writ of certiorari is rarely granted when the error consists of alleged erroneous factual findings or the misapplication of a properly stated rule of law. In this case, the Bank's argument is really simply a complaint about erroneous standard of review for factual findings, or the misapplication of a stated rule of law, by the Ninth Circuit. Although the Bank goes to great lengths to manufacture a circuit split, or a compelling reason of national significance, the grounds for granting the Petition simply do not exist.

In order for a case to be of "exceptional importance" within the content of considering a writ of certiorari, it must extend beyond the narrow limits of the parties to affect an entire industry or a large segment of the population. As discussed below, although this case

may be important to the Bank, it does not affect an entire industry, large population, nor is it of national significance. It is not the type of "exceptional importance" warranting a review by the Supreme Court.

The 9th Cir. Opinion does not create a split of authority among the circuit courts. The Bank has created a fictional story that deviates significantly from the facts, as described in more detail below. It has misstated and misapplied cited cases, and taken quotes from the 9th Cir. Opinion out of context. The Bank has misstated the findings of the Panel, and has created its own interpretations and language entirely different from the decision by the Panel. This case is nothing more than an attempted third appeal of the facts and the law, and contains no compelling reasons for involvement of the Supreme Court.

REASONS FOR DENYING THE PETITION

I. There Is No Split Of Authority Among The Circuits Regarding The Proper Test To Be Employed To Determine Non-Statutory Insider Status.

The implication in the Petition is that the 9th Cir. Opinion creates a circuit split regarding the proper test to determine non-statutory insider status. This argument is based upon the Bank's misunderstanding, or misrepresentation, of relevant circuit court decisions, and a misstatement of the 9th Cir. Opinion. In fact, for the reasons set forth below, the 9th Cir. Opinion is exactly consistent with other circuit court decisions.

A. The Panel Employed the Proper Legal Standard for Determining Whether A Person Is a Non-Statutory Insider.

The Bank takes issue with the Panel majority's statement that in determining non-statutory insider status courts must look to "(1) the closeness of the relationship with the debtor that is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arms length" (citations omitted). Village at Lakeridge, 814 F.3d at 1001. The Bank claims that the phrase "comparable to that of the enumerated insider classifications in §101(31)" somehow imposes an additional standard for determining non-statutory insider status that is in conflict with other circuit decisions. The Bank even goes so far as to state that the panel imposed "an additional requirement that the relationship must be the functional equivalent of a statutory insider." *See* Petition, page 26. This is, of course, not at all what the Panel found, and is simply an unsupported fictional statement imagined by the Bank.

The applicable circuit law in dealing with the determination of non-statutory insider status is not at all inconsistent with the standards employed by the Panel. In the case of In re: U.S. Medical, Inc., 531 F.3d 1272, 1277 (10th Cir. 2008), cited by the Bank, the court held "The inquiry then is whether there is a close relationship and whether there is anything other than closeness to suggest that any transactions were not conducted at arms length" (citation omitted). In the case of In re: Longview Aluminum, LLC, 657 F.3d 507, 509 (7th Cir. 2011), also relied upon by the Bank, the

court cited S.Rep.N. 989, 95th Cong. Sess., reprinted in 1978 U.S.C.A. N 5787, 5810, stating that "...the term insider can also encompass anyone with a 'sufficiently close relationship with a debtor that its conduct is made subject to closer scrutiny than those dealing with arms length with the debtor'." The court further stated "For this second approach, courts look to the closeness of the relationship between the parties." Id. at 509. The court went on to conduct a detailed analysis of whether the relationship of the alleged insider was "similar to or has characteristics of any of the defined relationships [of 11 U.S.C. § 101(31)]." Id., at 510. The court analyzed the relationship of the alleged insider with the company, the fact that he remained a member in the company, still had voting rights in the company and therefore still had some rights and control, all leading to a finding that he was a non-statutory insider.

The Panel used exactly the same standards as applied in other circuits. The Panel never held that in determining non-statutory insider status the relationship must be "the functional equivalent of a statutory insider." *See* Petition page 26. Rather, as clearly stated in the 9th Cir. Opinion, the Panel held that "U.S. Bank presents no evidence that Rabkin had a relationship with Lakeridge comparable to those listed in §101(31)." Village at Lakeridge, 814 F.3d at 1003. The Panel considered that Rabkin had little knowledge of the Debtor or the Debtor's sole member prior to acquiring the claim, had no insider information, did not control the Debtor or any of its members, was not controlled by Kathie Bartlett or any other member, and had no relationship with the remaining four managing members of MBP. The Panel

went on to conclude "U.S. Bank has not shown that Rabkin's relationship with Bartlett-who is indisputably a statutory insider of MBP and Lakeridge-is sufficiently close to compare with any category listed in § 101(31). Id. at 1003.

The Panel employed the proper standard in determining whether Rabkin was a non-statutory insider. The Panel did not add an additional requirement that the relationship must be the "functional equivalent of a statutory insider." Accordingly, the Panel's holding did not create any split among the circuits, and is unworthy of consideration by the Supreme Court on certiorari.

B. The Decision Did Not Create a Split Among The Circuits Regarding The Correct Standard Of Review For Determining Non-Statutory Insider Status.

The Bank argues that the Panel employed an inappropriate standard of review in conflict with other circuits because the Panel failed to consider the insider status as a mixed question of law and fact to be reviewed de novo. This argument by the Bank is simply based upon the Bank's misunderstanding of the meaning of "mixed question of law and fact." This standard of review means that the facts must be considered in light of the applicable legal standards. As discussed above, the Panel employed the appropriate applicable legal standards, which were not in conflict with any other circuit court. Once it is determined that the appropriate legal standard was employed, a review of the facts is, as almost always the case, determined on the basis of a "clearly erroneous"

standard. Even cases cited by the Bank are in support of this standard.

For example, in In re: Cellnet Data Systems, Inc., 327 F.3d 242, 244 (3rd Cir. 2003), cited by the Bank, the Third Circuit held "We review legal conclusions *de novo* and mixed question of law and fact under a mixed standard, affording a clearly erroneous standard to integral facts, but exercising plenary review of the lower court's interpretation and application of those facts to legal precepts" (citation omitted). Similarly, in In re: Windstar Communications, Inc., 545 F.3d 382, 394-395 (3rd Cir. 2009), the court held "Thus we will review the Bankruptcy Court's findings for clear error but exercise 'plenary review of the lower courts' interpretation and application of those facts to legal precepts'" (citation omitted). Finally, In The Matter of Fabricators, Inc., 926 F.2d 1458, 1463 (5th Cir. 1991), the court held "Moreover, when a finding of fact is premised on an improper legal standard, that finding loses the insulation of the clearly erroneous rule" (citation omitted). The court went on to conclude "a determination of insider status is a question of fact and therefore subject to the clearly erroneous standard of review" (citations omitted). Id., at 1466.

The Panel concluded that "The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous." Village at Lakeridge, p.1002. Furthermore, the Panel stated "Rather the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible, and we cannot reverse even if we may 'have weighed the evidence differently'" (citation omitted). Id. at 1004.

C. The Panel's Decision Did Not Create A Split Of Authority As To The Applicable Standard Of Review Regarding Non-Statutory Insider Status.

The Panel employed the appropriate legal standard for determining non-statutory status, and did not alter or deviate from decisions in other circuits. The Panel considered the factual findings of the bankruptcy court on a "clearly erroneous" basis, which is appropriate since the Panel was employing the appropriate legal standard. In short, the Panel's decision did not create a split of authority with any other circuit in considering insider status as a mixed question of law and fact.

II. Just Being An "Important" Decision Does Not Warrant Certiorari.

A. The Bank Exaggerates And Misrepresents The Panel's Decision.

The fundamental position of the Bank is that this decision will somehow wreak havoc upon the bankruptcy system. The Bank wants us to believe that the issue before the Panel was whether an insider claim can be transferred to a third party with the purpose of circumventing the Bankruptcy Code's prohibition against insider voting. *See* page 7 of Petition. Of course that question was not raised by the Bank, and was not before the Panel. It is an incendiary comment designed to create an appearance of importance. The Bank argues that the Panel's decision somehow paves the way for many chapter 11 debtors to "game" the system and circumvent statutory prohibitions against voting insider claims. But of course that also was not the issue before the Panel. It

is an issue without factual basis, created by and only in the imagination of the Bank. The Bank complains that creditors should not have to rely upon adjudication of factual issues to determine whether the assignment of an insider claim was in bad faith. *See* page 19 of Petition. However, factual issues are always at the heart of confirming a plan of reorganization. As stated by the Panel "Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis." Village at Lakeridge, p.1000. The Panel's decision may or may not be important. But the effects claimed by the Bank are fiction. They are not real, are not supported by any examples, and do not create an issue of "importance" within the context of Rule 10. Furthermore, as stated below, simply being "important" does not warrant granting the Petition. All appellants believe their case is important. Within the context of Rule 10, the "importance" must be exceptional, affect an entire industry or large population, or be of national significance. This case does not satisfy any of these requirements.

B. The Panel's Decision Regarding Assignments Does Not Conflict With Other Circuits.

In a passing comment, without analysis, the Bank slips in the allegation that at least two other circuit court decisions conflict with the Panel's decision. *See* page 13 of Petition. The Panel decided that "A person does not become a statutory insider solely by acquiring a claim from a statutory insider..." Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law-in which an assignee

takes a claim subject to any benefits and defects of the claim-does not apply." Village at Lakeridge, p.999. The Bank cites two decisions which it believes are inconsistent with this conclusion. However, the Bank is wrong, and both decisions directly support the Panel's decision. In In re: Applegate Prop., Ltd., 133 B.R. 827 (Bankr. W. D. Texas (1991), the bankruptcy court rejected the general rule that an entity which acquires a claim steps into the shoes of the claimant, and therefore (under the circumstances of that case) even though the assignor was a non-insider, the assignee was not automatically a non-insider. The court went on to conduct a factual analysis of whether or not the assignee was an insider, and determined that it was, and therefore the claim was an "insider claim." This is exactly consistent with the Panel's decision-just the flip side.

In In re: Holly Knoll Partnership, 167 B.R. 381 (Bankr. E. D. Pa. 1994), the bankruptcy court rejected the general rule that an entity which acquired a claim steps into the shoes of the claimant. As in Applegate the court determined whether the assignee of a non-insider claim was itself a non-insider, and determined that since the assignee was an insider the claim became an "insider claim." Again, this decision is consistent with the Panel's finding.

Any claim by the Bank that the transfer of an insider claim always remains an insider claim, regardless of the status of the holder, is completely devoid of factual support. There is no conflict among circuit decisions, or even among the bankruptcy court decisions, in this regard.

C. General Assignment Law Does Not Apply.

The Bank makes much ado over its assertion that the Panel failed to consider general assignment law. As discussed above, the Panel decided that general assignment law does not apply. The Panel was clearly correct. However, the correctness of the Panel's decision is not a basis for Supreme Court review. This issue does not fall within the purview of Supreme Court rule 10, and does not merit further discussion.

D. The Assignment Issue Does Not Warrant Granting The Petition.

The Bank claims that insider claims remain insider claims regardless of to whom they are transferred. Since the Panel disagreed, the Bank claims this creates an important federal question, as well as a question of "exceptional importance." Why is this an important federal question? According to the Bank, this decision will wreak havoc upon the bankruptcy confirmation process, as well as multiple other bankruptcy statues. Of course this has not happened, primarily because there are other safeguards in the Bankruptcy Code to prevent its abuse. As stated by the Panel:

> "Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan. A court may confirm a plan only if, among other requirements: (1) the plan and plan proponent comply with the bankruptcy code; (2) the plan is proposed in good faith; (3) the plan proponent has disclosed the identity of all insiders and potential insiders; (4) at least one class of impaired claims has accepted the plan

> (and no insider can vote); and (5) the plan 'is fair and equitable, with respect to each class of claims or interests the is impaired under, and has not accepted, the plan.' §1129. In addition, a court 'may designate any entity whose acceptance or rejection of [a] plan was not in good faith, or was not solicited or procured in good faith.' §1126(e). Therefore, U.S. Bank overstates its argument that, unless we reverse the BAP, debtors will begin assigning their claims to third parties in return for votes in favor of plan confirmation. We fail to see how establishing a rule that insider status transfers as a matter of law would better protect the creditor' rights then the current factual inquiry." Village at Lakeridge, p.1000.

More importantly, the Bank fails to explain how this issue fits within the purview of Supreme Court rule number 10. It is not a decision in conflict with another United States court, nor is it "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Courts supervisory power." Rule 10. It does not rise to the status of an "important question" of federal law that has not been settled by the Supreme Court. The Panel decision does not invalidate any federal or state statute on constitutional grounds, and is not an issue that recurs frequently and consumes substantial judicial resources. It does not involve enormous financial liabilities. The Panel's decision is simply a reasonable and correct interpretation of a federal statute not in conflict with any other circuit decision or state court decision.

CONCLUSION

None of the Bank's arguments warrant certiorari. There is no split of authority among the circuits regarding the proper rest to be employed to determine non-statutory insider status. There is no split of authority among the circuits that the assignee of an insider claim does not automatically remain the holder of an insider claim. The Panel's decision is not the type of "important decision" that warrants certiorari. In reality the Bank is simply seeking another appeal, a task unworthy of the consideration by the Supreme Court.

DATED this 15th day of August, 2016.

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No. 15-1509

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, *ET AL.*, BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly-held entity owns 10% or more of the stock of U.S. Bancorp.

TABLE OF CONTENTS

INTRODUCTION 13

A. The Ninth Circuit Significantly Undermines the Bankruptcy Code's Prohibition Against Insider Voting 2

B. The Ninth Circuit Decision Creates a Circuit Split Regarding the Standard of Review for Determining Non-Statutory Insider Status 8

C. The Ninth Circuit's Functional Equivalence Test for Determining Non-Statutory Insider Status Creates a Circuit Split 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of America Trust & Savings Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999) 6

In re Boyajian, 564 F.3d 1088 (9th Cir. 2009) 4

Cascades Dev. of Minn., LLC v. National Specialty Ins., 675 F.3d 1095 (8th Cir. 2012) 3-4

Citibank, N.A. v. TeleResources, Inc., 724 F.2d 266 (2d Cir. 1983) 3

Goldie v. Cox, 130 F.2d 695 (8th Cir. 1942) 3

Hendrie v. Sayles, 98 U.S. 546 (1878) 4

Matter of Holloway, 955 F.2d 1008 (5th Cir. 1992) 6

Interim Capital LLC v. Herr Law Group, Ltd., 2011 WL 7047062 (D. Nev. Oct. 21, 2011) 3

In re KB Toys, Inc.
736 F.3d 247 8

In re Krehl,
86 F.3d 737 (7th Cir. 1996).....9

In re Longview Aluminum, L.L.C.,
657 F.3d 507 (7th Cir. 2011).....9

In re NobleHouse Technologies, Inc.,
2013 WL 6816129 (Bankr.
N.D.N.Y. Dec. 24, 2013).....4

In re Stewart Foods, Inc.,
64 F.3d 141 (4th Cir. 1995).....3

Swarts v. Siegel,
117 F. 13 (8th Cir. 1902).....3

In re U.S. Med., Inc.,
531 F.3d 1272 (10th Cir. 2008).....9

In re The Village at Lakeridge,
814 F.3d 993 (9th Cir. 2016).....*passim*

In re Winstar Comm'ns., Inc.,
554 F.3d 382 (3d Cir. 2009) 9, 11

Statutes

11 U.S.C. § 101(31).....11, 12

11 U.S.C. § 503(c) 6

11 U.S.C. § 523(a)(2)(B) 4

11 U.S.C. § 547(b)(4)(B) 6

11 U.S.C. § 702(a)(3) 6

11 U.S.C. § 727(a)(7) 6

11 U.S.C. § 747(1) 6

11 U.S.C. § 1126(a) 4

11 U.S.C. §§ 1126(e) 5, 13

11 U.S.C. § 1129(a)(3) 5

11 U.S.C. § 1129(a)(5)(B) 6

11 U.S.C. § 1129(a)(10) ..... *passim*

Other Authorities

Bruce S. Nathan, *et al.*, *Last in Line: Purchasing Claims Free and Clear of a Debtor's Defenses*, AM. BANKR. INST. J., Oct. 2016 7

S. REP. NO. 95-989, tit. IV, ch. 11 4

Third Party Creditor Holding Claim Originally Owned by Debtor's Parent Entity May Vote for Cramdown Plan, Even Though Claim Was Purchased for Far Less than Full Value and Creditor Had Close Personal Relationship with Member of Parent's Board of Directors, COMM. FIN. NEWS, Feb. 22, 2016, at 2 ..... 7, 8

United States Cong. The Debates and Proceedings in the Congress of the United States, *et al.* (Gales & Seaton, 1834) 3

INTRODUCTION

The certiorari petition raises important questions regarding the proper interpretation of the Bankruptcy Code that will profoundly impact Chapter 11 bankruptcy cases and commercial transactions for years to come. The United States ignores the extraordinary policy implications resulting from the Ninth Circuit's decision, *In re The Village at Lakeridge*, 814 F.3d 993 (9th Cir. 2016) ("*Lakeridge*"), which now provides a basis for debtors to "game the system" by circumventing § 1129(a)(10)'s statutory prohibition against insider voting. The decision not only affects plan confirmation cases involving cramdown fights, but will impact the practice of claims trading and many areas of bankruptcy law that address the treatment of insiders.

At the heart of the United States' response is its mistaken belief that the Petition[1] raises factual rather than legal issues. This was the same mistake made by the Ninth Circuit. As discussed in the Petition, the material facts are undisputed, and the Petition asks the Court to resolve the following important legal issues capable of repetition: (a) whether an assignee of an insider claim acquires the claim subject to the assignor's insider status under the general law of assignment such that his vote cannot be considered to confirm a cramdown plan; (b) the proper test for determining non-statutory insider status; and (c) the proper standard of review for determining non-statutory insider status. *Lakeridge* also creates a

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[1] All capitalized terms have the meanings ascribed to them in the Petition.

circuit split regarding the appropriate test and standard of review for determining non-statutory insider status.

Numerous bankruptcy scholars have criticized *Lakeridge's* rationale and discuss the adverse consequences of the decision. Not a single published article has praised *Lakeridge* as having been correctly decided. Certiorari should be granted because of the profound policy implications of permitting insiders to wash their claims of insider status.

A. The Ninth Circuit Significantly Undermines the Bankruptcy Code's Prohibition Against Insider Voting

The United States ignores the significance of *Lakeridge* on bankruptcy law. The decision creates a legal loophole that enables debtors to subvert the Bankruptcy Code by assigning insider claims free of their insider status for the sole purpose of confirming a cramdown plan. As Judge Clifton noted:

> [T]he majority opinion effectively renders that statutory requirement meaningless.... [I]nsiders are free to evade the [Bankruptcy Code's prohibition against insider voting] simply by transferring their interest . . . to a friendly third party, who can then cast the vote the insider could not have cast itself.[2]

The United States argues without any legal authority that the general law of assignment does not preclude an assignee from voting a claim acquired from

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[2] *Lakeridge,* 814 F.3d at 1007 (J. Clifton, dissenting).

an insider under § 1129(a)(10), and that the Panel majority's "[f]ocus[ ] on the insider status of a current claimholder, rather than on the ownership history of a claim, is consistent with the logic and purposes of the relevant Code provisions." U.S. Br., at 10. This unsubstantiated reading of the statute is incorrect and renders the prohibition against insider voting meaningless.

Under general assignment law, an assignee stands in the shoes of its assignor and takes the claim subject to all of the assignor's rights and disabilities.[3] The rights and disabilities of claimholders "are fixed by the status of their claims when the petition in bankruptcy is filed."[4]As reported in the Congressional debates of 1790: "[T]he assignee stands ***precisely*** in the shoes of the assignor."[5] Common law has "long recognized that '[a]n assignment . . . provides the assignee with the ***same legal rights as the assignor had before assignment.***'"[6] A corollary to general assignment law is

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[3] *Citibank, N.A. v. TeleResources, Inc.*, 724 F.2d 266, 269 (2d Cir. 1983); *Goldie v. Cox*, 130 F.2d 695, 720 (8th Cir. 1942).

[4] *Swarts v. Siegel*, 117 F. 13, 14 (8th Cir. 1902). *See also In re Stewart Foods, Inc.*, 64 F.3d 141, 146 (4th Cir. 1995).

[5] United States Congress. The Debates and Proceedings in the Congress of the United States, *et al.* (Gales & Seaton, 1834), at 1293 (citing public debate of Feb. 17, 1790) (emphasis added).

[6] *Interim Capital LLC v. Herr Law Group, Ltd.*, 2011 WL 7047062, at *6 (D. Nev. Oct. 21, 2011) (citations omitted) (emphasis added); *Cascades Dev. of Minn.*,

the doctrine of *nemo dat qui non habet*: an assignor cannot give more than he has.[7]

The United States fails to cite any authority for the proposition that Congress intended to abrogate general assignment law when it enacted § 1129(a)(10). As the Ninth Circuit noted in a similar context involving the applicability of general assignment law to § 523(a)(2)(B), "[i]n the absence of . . . specific language, we believe that Congress intended that the general law of assignment remains applicable."[8] The same analysis applies here. The phrase, "any insider," as used in § 1129(a)(10) is not specific enough to abrogate general assignment law, but must be read in the context of claims voting. Only "[t]he holder of a claim . . . may accept or reject a plan."[9] The phrase, "any insiders," is not temporal but applies to claims held by insiders regardless of when the insider held the claim. The legislative history makes clear that "***any claims . . . held by insiders*** are not to be included for purposes of determining the number and amount of acceptances."[10] Because Rabkin's legal rights were tainted by MBP's

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LLC v. National Specialty Ins., 675 F.3d 1095, 1099 (8th Cir. 2012) (same).

[7] *Hendrie v. Sayles*, 98 U.S. 546, 550-51 (1878); *In re NobleHouse Technologies, Inc.*, 2013 WL 6816129, at *5 (Bankr. N.D.N.Y. Dec. 24, 2013) (citation omitted).

[8] *In re Boyajian*, 564 F.3d 1088, 1091 (9th Cir. 2009).

[9] 11 U.S.C. § 1126(a).

[10] See S. REP. NO. 95-989, tit. IV, ch. 11, sub-ch. II at 128 (1977) (emphasis added).

insider status, Rabkin acquired the claim subject to MBP's voting disqualification. Any other reading renders the Bankruptcy Code's prohibition against insider voting meaningless, and effectively increases the value of MBP's claim that Bartlett conceded was worthless. [11]

The United States focuses a significant portion of its analysis on the assignor's motives, concluding that "an outsider who purchases a claim from an insider would not inherit the insider's motives for voting to accept a proposed plan." *Id.* at 10-11. This is a red herring. While motives may have a bearing on whether a transaction was conducted at arm's length for purposes of determining *non-statutory insider status*, they have no bearing on whether an assignee of an insider claim acquires the *assignor's* insider status. If holders of insider claims were not disqualified from voting regardless of motive, virtually every debtor would cause an insider to manufacture and assign its claim to circumvent the prohibition against insider voting. Plan confirmation fights that turn on the vote of insider claims would virtually always become fights over whether the assignment was made in "good faith," which is an independent statutory requirement under §§ 1129(a)(3) and 1126(e). It is a mistake to impose a separate "good faith" requirement into § 1129(a)(10) as justification for ignoring the well-settled law of assignment.

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[11] Bartlett testified: "[W]e knew we couldn't vote that claim ourselves. It wasn't really worth anything to us." Tr. of H'rg on Designation Motion (Aug. 1, 2012), at 36, 42-43.

The United States' interpretation of § 1129(a)(10) also disregards the heightened scrutiny afforded insider transactions. [12] The Bankruptcy Code consistently treats the conduct of insiders and insider-transactions with close scrutiny. *See, e.g.*, §§ 503(c) (limiting insider compensation); 547(b)(4)(B) (extended preference period for insider transfers); 702(a)(3) (excluding insider voting for trustees); 727(a)(7) (establishing insider conduct as basis to deny discharge); 747(1) (subordinating insider claims to other customer claims); 1129(a)(5)(B) (requiring disclosure of insider retention). The "danger inherent in any reorganization plan proposed by a debtor . . . [is] that the plan will simply turn out to be too good a deal for the debtor's owners" at the expense of disfavored creditors. [13] The *Lakeridge* ruling undermines the Bankruptcy Code's prohibition against insider voting that was enacted to prevent the very type of artificial impairment and voting manipulation that would occur if claims could be manufactured and voted by insiders or their assignees.[14]

Several bankruptcy scholars have raised serious concerns that *Lakeridge* will be interpreted

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[12] *See Matter of Holloway*, 955 F.2d 1008, 1010-11 (5th Cir. 1992).

[13] *Bank of America Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 444 (1999) (absolute priority rule protects against "the ability of a few insiders . . . to use the reorganization process to gain an unfair advantage.") (Citation omitted).

[14] *See Lakeridge*, 814 F.3d at 1007 (J. Clifton, dissenting).

expansively to enable claims purchasers to acquire claims free and clear of disabilities. As one commentator describes:

> The [*Lakeridge*] decision eliminates a bright-line rule that insiders cannot "wash" their insider status by selling claims to sympathetic third parties. As a result, insiders will be incentivized to wash their claims and then argue that the facts and circumstances of the case excuse the buyer from being deemed a "statutory insider." . . . [T]he . . . decision opens the door for claims buyers to argue that other debtor payment defenses (similar to insider status) are not part of a claim's attributes, and therefore, the claim can be transferred free and clear of such defenses.[15]

Another scholar criticized *Lakeridge* for permitting claimants to wash their claims of disabilities by enabling assignees to acquire insider claims "free of the defenses that would have applied to the insider, even though the transferee is fully aware of those defenses and infirmities," and for granting assignees greater rights than those held by their assignors.[16] Thus, while

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[15] Bruce S. Nathan, *et al.*, *Last in Line: Purchasing Claims Free and Clear of a Debtor's Defenses, The Conflicting Views of the Third and Ninth Circuits*, AM. BANKR. INST. J., Oct. 2016, at 32.

[16] *Third Party Creditor Holding Claim Originally Owned by Debtor's Parent Entity May Vote for Cramdown Plan, Even Though Claim Was Purchased for Far Less than Full Value and Creditor Had Close*

the United States may not appreciate the impact *Lakeridge* will have in plan confirmation litigation, numerous bankruptcy scholars recognize the controversial nature of the decision and its impact on bankruptcy practice.[17]

The paradigm created by *Lakeridge* is particularly problematic for commercial real estate lenders, which base their financing structures on collateral isolation through single purpose entities to avoid artificially concocted cramdown plans. If this decision stands, it will be virtually impossible to create an ownership and operational structure that prevents artificial impairment and the resulting cramdown risk. The new realty will be reflected in higher financing costs and less available credit.

B. The Ninth Circuit Decision Creates a Circuit Split Regarding the Standard of Review for Determining Non-Statutory Insider Status

The United States incorrectly states that no circuit split exists on the appropriate standard of review for determining non-statutory insider status where the material facts are undisputed. The Ninth Circuit panel majority (the "Panel majority") applied a clearly erroneous standard of review whereas the Third, Fifth, Seventh, and Tenth Circuits apply a *de novo* standard

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Personal Relationship with Member of Parent's Board of Directors, COMM. FIN. NEWS, Feb. 22, 2016, at 2 (citing *In re KB Toys, Inc.*, 736 F.3d 247, 252 (3d Cir. 2013)).

[17] *See* Petition, at 10-11 (citing articles).

of review. [18] The United States concedes that *Lakeridge's* language is "imprecise," and "appears to elide the separate factual and legal components of the bankruptcy court's ultimate conclusion as to Rabkin's insider status." U.S. Br., at 14. However, the United States points to a footnote in which the Panel majority stated that it reviewed *de novo* the bankruptcy court's definition of non-statutory insider status, and "analyze[d] whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review." U.S. Br., at 14 (citing App. A, 15a n. 13). This is misleading because the Bankruptcy Court never articulated a test for determining non-statutory insider status, and the material facts in this case are undisputed. Therefore, the Panel majority's application of the facts to the law presented a legal question – or at least a mixed question of law and fact.

The Ninth Circuit's standard of review is inconsistent with the standard of review applied by other circuits. In the context of a case like this one, where the facts are not disputed, the Third and Tenth Circuits apply a *de novo* standard of review of the trial court's "'interpretation and application of those facts to legal precepts.'" [19] The United States attempts to

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[18] *Compare Lakeridge*, 814 F.3d 993, App. A, at 8a, *with In re Winstar Comm'ns., Inc.*, 554 F.3d 382, 395 (3d Cir. 2009); *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011); *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996); *In re U.S. Med., Inc.*, 531 F.3d 1272, 1275 (10th Cir. 2008).

[19] *Winstar*, 554 F.3d at 395 (quoting *CellNet Data*, 327 F.3d at 244); *see also U.S. Medical*, 531 F.3d at 175 (When "the facts are undisputed and the issue

explain away the Panel majority's error by suggesting that it did not mean what it said; that even if it "misstated the legal principles that govern appellate review . . ., the salient point is that the court of appeals understood the bankruptcy court to have found that an arm's length sale occurred...." U.S. Br., at 15. This assertion blatantly ignores what the Panel majority actually did: rubber stamp the Bankruptcy Court's legal determination of non-statutory insider status based on clear error review. The Panel majority did not independently review the undisputed facts to determine whether the Bankruptcy Court correctly interpreted and applied those facts to the law.[20] Indeed, the Panel majority suggested that its conclusion might be different had it weighed the evidence differently.[21] The majority of circuits that have considered the issue have applied a *de novo* standard of review to determinations of non-statutory insider status on the basis of undisputed facts.

This circuit split will have far reaching effect not only for future plan confirmation fights, but in many areas of bankruptcy and fraudulent conveyance law that hinge upon a determination of insider status because it effectively abdicates to the bankruptcy court sole responsibility for deciding mixed questions of law

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revolves around the legal conclusion drawn from the facts against the backdrop of a statute . . ., we have a mixed question of law and fact where the legal analysis predominates.... Our review is therefore de novo.") (Citation omitted).

[20] *See* Petition, at 6.

[21] *Id.* at 1003.

and fact. The consequences of upholding a clearly erroneous standard of review will result in widely divergent applications of the Bankruptcy Code among the nation's bankruptcy courts without any opportunity for meaningful appellate oversight.

C. The Ninth Circuit's Functional Equivalence Test for Determining Non-Statutory Insider Status Creates a Circuit Split

Finally, the United States ignores that the Ninth Circuit invented an entirely new test for determining non-statutory insider status which now requires the relationship to be "***comparable to that of the enumerated insider classifications in § 101(31)***."[22] This new language is not found in any other circuit court decision.[23]

While acknowledging the Ninth Circuit's newly-added language, the United States asserts that the Ninth Circuit actually looked at "whether the creditor shared a 'sufficiently close relationship with the debtor that [the creditor's] conduct is made subject to closer scrutiny than those dealing at arms [sic] length with the debtor." U.S. Br., at 17-18. The United States is wrong. The Ninth Circuit expressly applied a functional equivalence test when it held that Petitioner failed to show that "Rabkin's relationship with Bartlett

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[22] App. A, 13a (emphasis added).

[23] The Ninth Circuit erroneously cites *Winstar* for the proposition that "[n]on statutory insiders are the functional equivalent of statutory insiders . . . ." App. A, 13a (citing Winstar, 554 F.3d at 395). But the Third Circuit rejected this argument. *See Winstar*, at 396-97.

. . . is sufficiently close ***to compare with any category listed in § 101(31).***"[24] The Ninth Circuit gave deference to the Bankruptcy Court's consideration of just a few select factors for determining non-statutory insider status: control; separation of finances; cohabitation; and conducting business separately.[25] No circuit court has applied only these select factors for determining what constitutes an arm's length transaction.

The United States mistakenly conflates the arm's length test with bad faith. It asserts that Rabkin's non-statutory insider status "turns on the motivation for Rabkin's acquisition of MBP's claim," and suggests that the Bankruptcy Court's finding that the "insider claim was not assigned to Dr. Rabkin in bad faith . . ." should be "properly understood as an ***implicit determination*** that the sale was made at arm's length." U.S. Br., at 15, 19 (emphasis added). There is nothing in § 101(31) or any other provision of the Bankruptcy Code that suggests that the absence of bad faith alone satisfies the arm's length test. An "arm's length" transaction is:

> "1. A transaction between two unrelated and affiliated parties. 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises."[26]

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[24] App. A, 16a (emphasis added).

[25] *Id.* at 16a-17a.

[26] *Id.* at 13a-14a, n.11.

As Judge Clifton noted, "Rabkin and Bartlett were not 'unrelated and affiliated parties' . . . [and] [t]he transaction was not an arm's length transaction."[27] The Bankruptcy Court never made a finding that Bartlett and Rabkin negotiated the assignment as if they were strangers such that no conflict of interest arose. The Bankruptcy Court's analysis of whether a claim should be designated under § 1126(e) if the creditor's vote is accepted, solicited or procured in bad faith, is an entirely different analysis from whether the transaction at issue was conducted at arm's length.

No other circuit has applied a functional equivalence test to non-statutory insider determinations. *Lakeridge* creates a circuit split that should be resolved by this Court.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

Dated: March 1, 2017

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[27] *Id.*

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In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL., PETITIONERS

v.

THE VILLAGE AT LAKERIDGE, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Bankruptcy Code, 11 U.S.C. 101 *et seq.*, affords special treatment to creditors who are considered "insiders" under the Code. The Code provides that, before a Chapter 11 plan of reorganization may be approved, at least one class of impaired claims must vote in favor of the plan, determined "without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). The questions presented are as follows:

1. Whether a creditor who obtains a claim from an insider automatically acquires the original claimholder's insider status.

2. Whether a bankruptcy court's determination of insider status with respect to a particular claimholder should be reviewed de novo or for clear error.

3. Whether a creditor's status as a non-statutory insider should be determined based on whether the claimholder is functionally equivalent to one of the enumerated types of statutory insiders.

TABLE OF CONTENTS

Page

Statement 1
Discussion:
A. The first question presented does not warrant this Court's review 8
B. The second question presented does not warrant this Court's review 12
C. The third question presented does not warrant this Court's review 16
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 7
Anstine v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272 (10th Cir. 2008) 13, 18, 19
Boyajian v. *New Falls Corp. (In re Boyajian)*, 564 F.3d 1088 (9th Cir. 2009) 12
Browning Interests v. *Allison (In re Holloway)*, 955 F.2d 1008 (5th Cir. 1992) 13, 14
Christopher v. *Cox (In re Cox)*, 493 F.3d 1336 (11th Cir. 2007) 13
Dye v. *Brown (In re AFI Holding, Inc.)*, 530 F.3d 832 (9th Cir. 2008) 18
Friedman v. *Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63 (B.A.P. 9th Cir. 1991) 6
Goldie v. *Cox*, 130 F.2d 695 (8th Cir. 1942) 11
Gullickson v. *Brown (In re Brown)*, 108 F.3d 1290 (10th Cir. 1997) 14
KB Toys Inc., In re, 736 F.3d 247 (3d Cir. 2013) 11

Cases—Continued: Page

Koch v. *Rogers (In re Broumas)*, 135 F.3d 769, 1998 WL 77842 (4th Cir. 1998) 13
Krehl, In re, 86 F.3d 737 (7th Cir. 1996) 13, 18
Longview Aluminum, L.L.C., In re, 657 F.3d 507 (7th Cir. 2011) 17, 18
Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 16
Miami Police Relief & Pension Fund v. *Tabas (In re Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72 (11th Cir. 2005) 13
Miller v. *Schuman (In re Schuman)*, 81 B.R. 583 (B.A.P. 9th Cir. 1987) 6
Rupp v. *United Sec. Bank (In re Kunz)*, 489 F.3d 1072 (10th Cir. 2007) 18
Samson v. *Alton Banking & Trust Co. (In re Ebbler Furniture & Appliances, Inc.)*, 804 F.2d 87 (7th Cir. 1986) 14
Schubert v. *Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382 (3d Cir. 2009) 13, 19
South Beach Sec., Inc., In re, 606 F.3d 366 (7th Cir. 2010) 10
Swarts v. *Siegel*, 117 F. 13 (8th Cir. 1902) 11

Statutes and rule:

Bankruptcy Act, ch. 541, 30 Stat. 544 11
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(31) 2, 5, 9, 16
11 U.S.C. 101(31)(B) 2, 4
11 U.S.C. 303(b)(2) 3
11 U.S.C. 547(b)(4)(B) 3
11 U.S.C. 548(a)(1)(B)(IV) 3
11 U.S.C. 702(a)(3) 3
11 U.S.C. 727(a)(7) 3

Statutes and rule—Continued: Page

Ch. 11, 11 U.S.C. 1101 *et seq.* 1, 4
11 U.S.C. 1121 1
11 U.S.C. 1122 1
11 U.S.C. 1123 1
11 U.S.C. 1124 2
11 U.S.C. 1126(c) 9
11 U.S.C. 1129 ..... 8, 9
11 U.S.C. 1129(a)(8)(A) 2
11 U.S.C. 1129(a)(8)(B) 2
11 U.S.C. 1129(a)(10) 2, 9, 11, 12
11 U.S.C. 1129(b) 2
Sup. Ct. R. 10 16

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Vol. 2 3
Vol. 5 16
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In the Supreme Court of the United States

No. 15-1509

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL., PETITIONERS

v.

THE VILLAGE AT LAKERIDGE, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Chapter 11 of the Bankruptcy Code provides for the reorganization of financial obligations of a business enterprise or individual. 11 U.S.C. 1101 *et seq.* Chapter 11 bankruptcies are implemented according to a "plan" (usually, but not always, filed by the debtor, 11 U.S.C. 1121) that assigns to "classes" the various allowed claims against the debtor and specifies the treatment each class of claims shall receive under the plan, 11 U.S.C. 1122, 1123. A court generally may confirm a proposed Chapter 11 plan only if each class of creditors "has accepted the plan"

or "is not impaired under the plan." 11 U.S.C. 1129(a)(8)(A) and (B); see 11 U.S.C. 1124. In certain circumstances, however, the Code provides a mechanism for confirming a plan that impairs the claims or interests of a non-consenting creditor. 11 U.S.C. 1129(b). In order to be confirmable over the objection of an impaired creditor, the plan must satisfy a number of criteria, including the requirement that "at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). The questions presented in this case concern the circumstances in which a creditor should be treated as an "insider" for purposes of that provision.

b. The Bankruptcy Code contains a non-exhaustive list of persons and entities with "insider" status. 11 U.S.C. 101(31). When, as here, the debtor is a corporation, "[t]he term 'insider' includes * * * (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. 101(31)(B). Persons or entities falling into one of those categories are generally referred to as "statutory insiders." Because the statutory definition of "insider" is non-exhaustive, bankruptcy law also recognizes that other persons (and entities) can be "non-statutory insiders." Such persons do not fall within any of the categories listed in Section 101(31), but they have "a sufficiently close relationship with the debtor that [their] conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978) (Senate Re-

port); H.R. Rep. No. 595, 95th Cong. 1st Sess. 312 (1977) (House Report); see 2 *Collier on Bankruptcy*, ¶ 101.31, at 101-142 (Allen N. Resnick & Henry J. Sommer, eds., 16th ed. 2016) (*Collier*) (explaining that "a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length") (citation omitted). Congress left the definition of "insider" somewhat "open ended because the term is not susceptible of precise specification." House Report 314.

Under the Bankruptcy Code, dealings between an insider and a corporate debtor are subject to particularly close scrutiny. See 2 *Collier* ¶ 101.31, at 101-140 ("An 'insider' generally is an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny."). The Code also bars insiders from exercising some of the prerogatives that other creditors possess. In a Chapter 7 case, for example, an insider is not permitted to vote for a candidate for trustee. 11 U.S.C. 702(a)(3); see 11 U.S.C. 303(b)(2) (excluding insiders when determining whether a sufficient number of creditors has joined together to initiate an involuntary bankruptcy). Insider status is also a factor in determining whether a pre-petition transfer may be avoided, 11 U.S.C. 547(b)(4)(B), 548(a)(1)(B)(IV), and whether certain debts may be discharged in a Chapter 7 bankruptcy, 11 U.S.C. 727(a)(7).

2. Respondent[1] is a limited liability corporation with only one member, MBP Equity Partners 1, LLC

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[1] Although the case caption on this Court's docket indicates that there are multiple petitioners and respondents in this case, the petition for a writ of certiorari indicates (Pet. ii) that U.S. Bank National Association is the sole petitioner and that The Village at

(MBP). Pet. App. 3a. MBP is managed by a board of five members, one of whom is Kathy Bartlett. *Ibid.* MBP and Bartlett are both statutory insiders of respondent. *Id.* at 16a. Bartlett "shares a close business and personal relationship" with Dr. Robert Rabkin. *Id.* at 3a. The controversy in this case concerns the question whether Rabkin is also an insider of respondent.

In June 2011, respondent filed a voluntary petition for bankruptcy under Chapter 11 of the Code. Pet. App. 3a. At that time, respondent had two creditors: petitioner held a fully secured claim worth approximately $10 million, and MBP held an unsecured claim worth approximately $2.76 million. *Ibid.* On September 14, 2011, respondent filed a proposed plan of reorganization that would impair both claims. See C.A. E.R. 340, 347-351, 379-383. Because petitioner would not consent to the proposed plan, see *id.* at 578-579, the plan could not be confirmed unless another non-insider claim that would be impaired by the plan voted to accept the plan. But the only other claim was held by MBP, a statutory insider. See 11 U.S.C. 101(31)(B). In the absence of a confirmable plan, respondent would have been liquidated and MBP would have had little hope of recovering on its unsecured claim or on its ownership of respondent. Pet. App. 20a-21a.

Acting on behalf of MBP's board, Bartlett approached Rabkin and offered to sell MBP's $2.76 million claim to him for $5000. Pet. App. 4a. Rabkin agreed to the proposal without negotiating over the price or investigating what the claim might be worth.

Lakeridge, LLC is the sole respondent. In this brief, we refer to those parties as petitioner and respondent, respectively.

Id. at 4a, 19a-20a. Petitioner then moved to designate Rabkin's claim as an insider claim and to disallow it for voting purposes. *Id.* at 5a.

3. The bankruptcy court granted petitioner's motion. Pet. App. 61a-70a. The court found that "Dr. Rabkin is not a non-statutory insider because, among other things, (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay Mr. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin." *Id.* at 66a. The court further found that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class for purposes of cramdown." *Id.* at 67a. The bankruptcy court concluded, however, that Rabkin was a statutory insider because "Dr. Rabkin, as the assignee of the claim, acquired the same status as" statutory insider MBP when he purchased the claim. *Id.* at 67a.

4. The Bankruptcy Appellate Panel of the Ninth Circuit reversed. Pet. App. 28a-60a.

The panel held that Rabkin was not a statutory insider because he does not fall within any of the enumerated categories in the statutory definition, Pet. App. 39a-41a; see 5 U.S.C. 101(31), and because the assignee of an insider claim does not automatically become a statutory insider by virtue of the assignment, Pet. App. 45a-48a. The panel upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. *Id.* at 41a-44a. The panel noted

that "a non-statutory insider is one 'who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.'" *Id.* at 41a. (quoting *Freidman* v. *Sheila Plotsky Brokers, Inc. (In re Freidman)*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991)). That closer scrutiny, the court explained, requires both an "examination for an arms-length transaction" and an assessment of whether "the creditor 'exercises such control or influence over the debtor as to render their transaction not arms-length.'" *Id.* at 42a (quoting *Miller* v. *Schuman (In re Schuman)*, 81 B.R. 583, 586 (B.A.P. 9th Cir. 1987)). The panel concluded that, "[w]hile others might come to a different conclusion," the bankruptcy court had not clearly erred in concluding on the basis of Rabkin's and Bartlett's testimony that Rabkin was not a non-statutory insider. *Id.* at 44a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

All three members of the court of appeals agreed that "[a] person does not become a statutory insider solely by acquiring a claim from a statutory insider." Pet. App. 10a; see *id.* at 19a. The majority noted that "bankruptcy law distinguishes between the status of a claim and that of a claimant." *Id.* at 10a. It explained that "[i]nsider status pertains only to the claimant" and "is not a property of a claim." *Ibid.* The court also stated that "a person's insider status is a question of fact that must be determined after the claim transfer occurs." *Ibid.*

A majority of the court of appeals also upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. Pet. App. 13a-18a. The court explained that it applies de novo review to "the bankruptcy court's definition of non-statutory insider sta-

tus, which is a purely legal question," *id.* at 15a n.13, while "review[ing] the bankruptcy court's factual finding for clear error," *id.* at 15a. On the legal question, the court agreed with the bankruptcy court that, in determining whether a creditor is a non-statutory insider, "[a] court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length." *Id.* at 14a. The majority also held that the bankruptcy court's factual findings on the nature of Rabkin's relationship with Bartlett and MBP and on the nature of the transaction transferring MBP's claim to Rabkin were "not clearly erroneous." *Id.* at 16a.[2] The majority held that the bankruptcy court had not clearly erred in concluding that neither Rabkin's relationship with respondent nor Rabkin's relationship with insider Bartlett was "sufficiently close to compare with any category listed in § 101(31)." *Id.* at 16a. The majority further held that the bankruptcy court had not clearly erred in concluding that the transaction had been conducted at arm's length. *Id.* at 17a n.15.

Judge Clifton dissented from the court of appeals' conclusion that Rabkin was not a non-statutory insider. Pet. App. 19a-27a. Although Judge Clifton agreed with the criteria used by the majority to identify non-statutory insiders, he would have held that the bank-

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[2] In response to the dissent's conclusion that Rabkin was a non-statutory insider, the majority explained that "[t]he dissent did not preside over the evidentiary hearing and did not hear the evidence in person," and that the court of appeals "cannot substitute its judgment for that of the bankruptcy court 'simply because it is convinced that it would have decided the case differently.'" Pet. App. 16a n.14 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)); see *id.* at 17a n.16.

ruptcy court had clearly erred in concluding that Rabkin did not satisfy those criteria. *Id.* at 19a. Judge Clifton explained that, in his view, "[t]he facts make clear that this transaction was negotiated at less than arm's length." *Ibid.*; see *id.* at 19a-22a. Although Judge Clifton agreed that the bankruptcy court's analysis of the relationship between Rabkin and Bartlett "would support a finding that Rabkin and Bartlett are separate financial entities," in his view it would "not show that the transaction was conducted" at arm's length. *Id.* at 23a.

DISCUSSION

The court of appeals correctly stated the legal standards for determining whether a creditor is a statutory or non-statutory insider, and it correctly articulated the applicable standard of appellate review. The court's articulation of those legal principles does not conflict with any decision of this Court or of another court of appeals. The court's application of the governing legal standard in conducting clear-error review of the bankruptcy court's factual findings raises no issue of general importance. Further review is not warranted.

A. The First Question Presented Does Not Warrant This Court's Review

Petitioner argues (Pet. 7-19) that, because Rabkin purchased his claim from a statutory insider, Rabkin should be treated as a statutory insider as well. The court of appeals correctly rejected that argument, and its ruling does not conflict with any decision of this Court or another court of appeals.

1. Section 1129 of the Bankruptcy Code permits a bankruptcy court to confirm a "cram-down" plan—*i.e.*,

a plan of reorganization that impairs the rights of an objecting creditor—only if certain requirements are satisfied. 11 U.S.C. 1129. One such requirement is the acceptance of the plan by "at least one class of claims that is impaired under the plan * * * , determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). For purposes of Section 1129(a)(10), "[a] class of claims has accepted a plan if such plan has been accepted by creditors * * * that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors * * * that have accepted or rejected such plan." 11 U.S.C. 1126(c). When, as here, each class of claims contains only one creditor, that creditor (if he is a non-insider) may decide whether to accept or reject a plan. When a class of creditors contains both insiders and non-insiders, only the votes of non-insider creditors may be considered in determining whether the class has accepted a proposed plan.

Although Section 1129(a)(10) refers to acceptance of a plan by a "class of claims," a "claim" is not literally capable of accepting or opposing a plan. Rather, as Section 1126(c) makes clear, the determination whether particular "claims" have accepted a plan turns on whether the requisite number of creditors who hold those claims has accepted it. Section 1129(a)(10)'s reference to "acceptance of the plan by any insider" reinforces that understanding because the statutory definition of "insider" turns on attributes of an individual or entity holding a claim, not on attributes of the claim itself. See 11 U.S.C. 101(31). Thus, in carrying out Section 1129(a)(10)'s directive to disregard "any acceptance of the plan by any insider," the court

should focus on whether the creditor who purports to accept the plan is an insider, not on any attribute of the claim itself or on whether an insider previously owned the claim.

Focusing on the insider status of a current claimholder, rather than on the ownership history of a claim, is consistent with the logic and purposes of the relevant Code provisions. A creditor who is also an insider often has a substantial interest, not necessarily shared by other creditors, in ensuring that a debtor business continues to operate rather than liquidating. As a result, an insider will often have an incentive to accept impairment under a plan of reorganization so that it may continue to benefit, by virtue of its insider status, from the debtor's ongoing operation. Because an insider is in a position to advance its own interests by influencing the drafting of a proposed plan, moreover, the degree of impairment it may be willing to accept does not reflect the type of arm's-length bargaining that would be reflected in the acceptance of impairment by a non-insider creditor. "The exclusion of insiders in deciding whether a plan has been accepted by impaired creditors is intended to prevent conflicts of interest that can arise when a creditor has substantial influence over the debtor beyond what is implicit in being a creditor," and to reduce the "risk of collusion between an insider creditor and the debtor at the expense of other creditors." *In re South Beach Sec., Inc.*, 606 F.3d 366, 377-378 (7th Cir. 2010).

The conflict-of-interest concerns described above are tied to the identity and possible incentives of the claimholder who purports to accept a plan, not to the nature or ownership history of the underlying claim. An insider's potential conflict of interest is not less-

ened when it holds a claim that it purchased from an outsider. By the same token, an outsider who purchases a claim from an insider would not inherit the insider's motives for voting to accept a proposed plan. As Judge Clifton explained in his dissent below, "[a]s long as the interest previously owned by a statutory insider was acquired by an independent party, for bona fide reasons, uninfected with the unique motivations of the insider, there is no reason that the insider taint should always be unshakeable." Pet. App. 19a. The court of appeals was therefore correct to reject petitioner's argument that a creditor who purchases a claim from an insider automatically takes on insider status.

2. Petitioner argues (Pet. 14) that other courts of appeals "have recognized the applicability of the general law of assignment in bankruptcy cases," and that (Pet. 16) "[t]he Ninth Circuit's refusal to apply general assignment law for purposes of plan voting conflicts with" those decisions. There is no conflict among the courts of appeals about whether an outsider who purchases an insider's claim automatically obtains insider status for purposes of Section 1129(a)(10). As petitioner acknowledges (Pet. 14-16), all of the decisions on which it relies applied general assignment principles in construing *other* provisions of the Code. And all of the court of appeals decisions that petitioner contends conflict with the decision below address provisions of the Code (or of the predecessor Bankruptcy Act, ch. 541, 30 Stat. 544) that identify particular types of *claims* that should be disallowed in bankruptcy. See Pet. 14-15 (citing *In re KB Toys Inc.*, 736 F.3d 247, 251-254 (3d Cir. 2013); *Goldie* v. *Cox*, 130 F.2d 695, 720 (8th Cir. 1942); *Swarts* v. *Siegel*, 117

F. 13, 15 (8th Cir. 1902).[3] The approach of those courts does not conflict with the approach of the court below, however, because the Code provisions at issue in those cases address the treatment of particular types of claims, not the treatment of particular types of claimholders.

B. The Second Question Presented Does Not Warrant This Court's Review

Petitioner contends (Pet. 19-24) that this case implicates a conflict in the circuits about whether a determination of non-statutory insider status should be reviewed de novo or for clear error. That argument lacks merit. The court of appeals applied the correct standard of appellate review, and that aspect of the court's decision does not conflict with any decision of this Court or of any other court of appeals.

The court of appeals correctly explained that, when an appellate court reviews a trial court's determination concerning a creditor's insider status, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. Pet. App. 8a. Petitioner contends (Pet. 19) that the court of appeals' approach conflicts with "the majority of circuit courts * * * , which hold that questions of insider status are mixed questions of law and fact to be reviewed *de novo*." A mixed question is a question

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[3] Petitioner also contends that the decision below conflicts with another decision of the Ninth Circuit. See Pet. 15 (citing *Boyajian* v. *New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1091 (2009)). Because the court in *Boyajian* did not address the effect for purposes of Section 1129(a)(10) of assigning an insider claim, that decision does not conflict with the decision below. In any event, an intra-circuit conflict is not a basis for review by this Court.

that involves the application of a legal standard to the facts of a particular case.

All of the decisions on which petitioner relies agree that insider status is a mixed question of fact and law. See *Schubert* v. *Lucent Techs., Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 394-395 (3d Cir. 2009); *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1275 (10th Cir. 2008); *Miami Police Relief & Pension Fund* v. *Tabas (In re Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005); *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996); see *Browning Interests* v. *Allison (In re Holloway)*, 955 F.2d 1008, 1014-1015 (5th Cir. 1992) (explaining, in the context of reviewing a determination of insider status, that a bankruptcy court's findings of fact are reviewed for clear error while its legal conclusions are reviewed de novo).[4] Those courts also agree that, when an appellate court reviews a trial court's resolution of a mixed question, it should apply deferential (clear-error) review to any trial-court factual findings and de novo review to both the trial court's articulation of the governing legal standard and the trial court's application of that standard to those factual findings. *In re Winstar Commc'ns, Inc.*, 554 F.3d at 395 (3d Cir.); *Christopher* v. *Cox (In re Cox)*, 493

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[4] Petitioner cites (Pet. 20) *Koch* v. *Rogers (In re Broumas)*, 135 F.3d 769, 1998 WL 77842 (1998) (Tbl.), in which the Fourth Circuit stated that "insider status is determined by a factual inquiry into the debtor's relationship with the alleged insider," and held that the bankruptcy court's findings on that question were not "clearly erroneous." *Id.* at *7-*8. That statement is not inconsistent with the court of appeals' approach in this case because there appears to have been no dispute as to the applicable legal standard in *Broumas*, leaving only a dispute about the correctness of the bankruptcy court's factual findings.

F.3d 1336, 1340 n.9 (11th Cir. 2007); *Gullickson* v. *Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997); *In re Holloway*, 955 F.2d at 1014 (5th Cir.); *Samson* v. *Alton Banking & Trust Co. (In re Ebbler Furniture & Appliances, Inc.)*, 804 F.2d 87, 89 (7th Cir. 1986). That is what the court of appeals did in this case.

To be sure, the court of appeals' opinion includes some imprecise language. The court stated, for example, that "[t]he bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous," Pet. App. 16a—a statement that, viewed in isolation, appears to elide the separate factual and legal components of the bankruptcy court's ultimate conclusion as to Rabkin's insider status. But the court of appeals elsewhere made clear that it was applying clear-error review to the bankruptcy court's factual findings, and de novo review to the court's articulation of the legal standard. See *id.* at 8a ("Establishing the definition of non-statutory insider status is * * * a purely legal inquiry. We review questions of law de novo."); *id.* at 15a n.13 (explaining that the court of appeals had "reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question," and had then "analyze[d] whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review").

Although the bankruptcy court cited an array of facts indicating that Rabkin is not a non-statutory insider, see Pet. App. 66a-67a, that court did not find in so many words that Rabkin's purchase of MBP's claim was an "arm's length transaction." Petitioner suggests

that this omission is significant. Pet. 21 n.4. But the various findings that the bankruptcy court did make—including the finding that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class," Pet. App. 67a—are properly understood as an implicit determination that the sale was made at arm's length.

In any event, in determining whether the Ninth Circuit misstated the legal principles that govern appellate review of bankruptcy-court decisions, the salient point is that the court of appeals understood the bankruptcy court to have found that an arm's-length sale occurred. The Ninth Circuit stated that "[t]he [bankruptcy] court's failure to use the words 'arm's length transaction' is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider." Pet. App. 17a n.15. Any doubt as to whether the court of appeals correctly construed the bankruptcy court's findings is confined to the circumstances of this case and raises no issue of general importance.

Judge Clifton in dissent suggested that, if the bankruptcy court found that the sale of MBP's claim was made at arm's length, that finding was clearly erroneous. See Pet. App. 19a ("The facts make it clear that this transaction was negotiated at less than arm's length."). The dissenting opinion identifies substantial grounds for doubting the bankruptcy court's determination that Rabkin acquired the claim for legitimate investment purposes, rather than as a means of benefiting a statutory insider with whom he had a close personal relationship. But the parties' dispute as to the motives of MBP and Rabkin for transferring

the claim raises a purely factual issue. See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (explaining that the "state of a man's mind is as much a fact as the state of his digestion") (citations omitted). And the question whether the bankruptcy court's resolution of that factual dispute was clearly erroneous does not warrant this Court's review. See Sup. Ct. R. 10 (stating that this Court generally does not grant a petition for a writ of certiorari to correct "erroneous factual findings or the misapplication of a properly stated rule of law.").

C. The Third Question Presented Does Not Warrant This Court's Review

Finally, petitioner seeks (Pet. 24-28) this Court's review of the court of appeals' articulation of the legal standard for determining non-statutory insider status. Review of that question is unwarranted because the court of appeals correctly stated the legal standard, and its articulation of that standard does not conflict with any decision of this Court or of any other court of appeals.

Under the definition of "insider" set forth in Section 101(31), "[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." House Report 312; Senate Report 25. In determining whether a creditor is a non-statutory insider (*i.e.*, a person who should be treated as an insider even though he does not fall within the non-exhaustive list of examples contained in Section 101(31)), courts should therefore "focus[] on two factors: (1) the closeness of the relationship between the parties; and (2) whether the transaction was negotiated at arm's length." 5 *Collier* ¶ 547.03[6], at

547-35 to 547-36. That analysis is "a case-by-case decision based on the totality of the circumstances." *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011). The court of appeals in this case recognized and applied that standard. See Pet. App. 14a ("A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length.").

Petitioner appears to agree (Pet. 24-27) that a court should determine non-statutory insider status by examining both the closeness of the relationship between a creditor and the debtor and whether the relevant transaction was conducted at arm's length. Petitioner contends (Pet. 26), however, that the court of appeals departed from that standard "by imposing an additional requirement that the relationship must be the functional equivalent of a statutory insider." Petitioner bases that contention (see Pet. 24) on the court of appeals' statement that a person does not qualify as a non-statutory insider unless "the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31)." Pet. App. 13a.

Viewed in context, however, that statement merely explains that "[a] court cannot assign non-statutory insider status to a creditor simply because it finds that the creditor and debtor share a close relationship." Pet. App. 14a. Consistent with congressional intent, the court of appeals looked not simply at whether the relationship in question could be colloquially described as "close," but at whether the creditor shared a "sufficiently close relationship with the debtor that [the creditor's] conduct is made subject to closer scrutiny than those dealing at arms [sic] length with the

debtor." *Id.* at 9a (quoting Senate Report 25; House Report 312) (second set of brackets in original). In other cases, the Ninth Circuit has similarly explained that it determines non-statutory insider status by examining whether a "relationship compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Dye* v. *Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 849 (9th Cir. 2008) (citation omitted). That approach is consistent with the text and purpose of the relevant statutory provisions.

Petitioner's argument (Pet. 24-27) that the court of appeals' decision conflicts with decisions of other circuits is premised on its erroneous contention (Pet. 24) that the court below imposed a "'functional equivalent' test." Like the Ninth Circuit, the other courts of appeals on whose decisions petitioner relies (see Pet. 24-26) examine whether a relationship is "close enough to gain an advantage attributable simply to affinity" or is "sufficiently close" that the creditor's "conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." *In re U.S. Med., Inc.*, 531 F.3d at 1276 (10th Cir.) (quoting *Rupp* v. *United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078-1079 (10th Cir. 2007) (emphasis and internal quotation marks omitted)); see *In re Longview Aluminum, L.L.C.*, 657 F.3d at 509 (7th Cir.) ("[O]ur case law has also held that the term insider can also encompass anyone with a 'sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.'") (quoting *In re Krehl*, 86 F.3d at 741-

742); see *In re Winstar Commc'ns, Inc.*, 554 F.3d at 396-397 (3d Cir.) ("the question 'is whether there is a close relationship [between debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arm's length.'") (quoting *In re U.S. Med., Inc.*, 531 F.3d at 1277).[5]

As explained above, the parties' dispute about Rabkin's "non-statutory insider" status turns on the motivation for Rabkin's acquisition of MBP's claim. The dissenting judge below concluded that "the only logical explanation for Rabkin's actions here" was that Rabkin "did a favor for a friend." Pet. App. 21a. The majority noted the dissent's assessment but concluded that "the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical." *Id.* at 17a n.16. Whatever the merits of those competing views of the record, that dispute raises no legal issue warranting this Court's review.

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[5] Petitioner is also wrong in arguing (Pet. 24-25) that the decision below conflicts with decisions of the Third and Tenth Circuit by holding that "actual control" is a prerequisite to a finding of non-statutory insider status. The Ninth Circuit here agreed that "actual control is not required to find non-statutory insider status." Pet. App. 14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2017

AND
RIEFS

No. 15-1509

FILED
JUN 12 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL. BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 13, 2016
CERTIORARI GRANTED MARCH 27, 2017

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COUNSEL PRESS

TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 2013-60038....1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 2013-60039 ...10

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT, NO. 2012-1456 19

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT, NO. 2012-1474.....28

U.S. BANKRUPTCY COURT DISTRICT OF NEVADA (RENO), NO. 11-51994-BTB.....36

NOTICE OF ASSIGNMENT/TRANSFER OF CLAIM (NOV. 4, 2011) [BANKR. DOC. 78]....61

U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM, OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(E), 1129(A) AND 105(A) (JULY 1, 2012) [BANKR. DOC. 198] 64

Page

OPPOSITION TO U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM OR (B) DISALLOW CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(E), 1129(A) AND 105(A) (JULY 19, 2012) [BANKR. DOC. 213] 83

CERTIFICATE OF ACCEPTANCE AND REJECTION OF CHAPTER 11 PLAN [BALLOT SUMMARY] (JULY 30, 2012) [BANKR. DOC. 240].....95

TRANSCRIPT OF HEARING HELD ON U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM, OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(E), 1129(A) AND 105(A) (AUG. 1, 2012) [BANKR. DOC. 255] 103

MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (FEB. 8, 2016) [9TH CIR. DOC. 50].....157

ORDER GRANTING CERTIORARI (MAR. 27, 2017).....161

Page

The following opinions and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for a writ of certiorari:

Appendix A: Ninth Circuit Court of Appeals Opinion (Feb. 8, 2016)
Appendix B: Ninth Circuit Bankruptcy Appellate Panel Memorandum (Apr. 5, 2013)
Appendix C: Bankruptcy Court Order (Aug. 20, 2012)
Appendix D: Ninth Circuit Court of Appeals Order (Mar. 16, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

NO. 2013-60038

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK, TRUSTEE, *et al.*, BY AND THROUGH
CWCAPITAL ASSET MANAGEMENT LLC,
SOLELY IN ITS CAPACITY AS SPECIAL
SERVICER,

APPELLANT,

V.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Date Filed	#	Docket Text
04/26/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes.

Setting schedule as follows: Mediation Questionnaire due on 05/03/2013. Appellant U.S. Bank National Association opening brief due 07/29/2013. Appellee The Village at Lakeridge, LLC answering brief due 08/27/2013 Appellant's optional reply brief is due 14 days after service of the answering brief. [8606283] (FB) [Entered: 04/26/2013 10:58 AM]

* * *

05/07/2013	4	Received Appellant U.S. Bank National Association notice - statement of issues on appeal and designation of record on appeal. [8620029] (CW) [Entered: 05/07/2013 02:37 PM]

* * *

01/24/2014	13	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant U.S. Bank National Association. Date of service: 01/24/2014. [8952238] (Owens, Keith) [Entered: 01/24/2014 10:09 PM]

* * *

02/03/2014	15	Filed clerk order (Deputy Clerk: AMT): Appellant's unopposed motion

to consolidate Nos. 13-60038 and 13-60039 is granted. The consolidated opening brief already received is ordered filed. The consolidated answering brief is due March 7, 2014. The consolidated optional reply brief is due within 14 days after service of the consolidated answering brief. [8962676] [13-60038, 13-60039] (HC) [Entered: 02/03/2014 10:38 AM]

02/03/2014	16	Filed amended clerk order: This order amends the order [14] filed on January 27, 2014 in No. 13-60038. The opening brief [13], [8952239-2] submitted by U.S. Bank National Association in 13-60038, 13-60039 is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [13], [8952239-2] submitted by U.S. Bank National Association

		in 13-60038, 13-60039. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [8964053] [13-60038, 13-60039] (LA) [Entered: 02/03/2014 04:48 PM]
		* * *
02/03/2014	18	Filed Appellant U.S. Bank National Association paper copies of excerpts of record [13], [8952239-2] in 4 volume(s). [8966898] [13-60038, 13-60039] (LA) [Entered: 02/05/2014 11:51 AM]
03/07/2014	19	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by - The Village at Lakeridge, LLC in 13-60038, 13-60039. Date of service: 03/07/2014. [9007965] [13-60038, 13-60039]--[COURT UPDATE: Attached corrected brief. Resent NDA. 03/10/2014 by RY]--[Edited: Edited docket text to reflect correct brief type. 03/10/2014 by RY] (Smith, Alan) [Entered: 03/07/2014 05:47 PM]

03/10/2014	20	Filed clerk order: The answering brief [19] submitted by The Village at Lakeridge, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [19] submitted by The Village at Lakeridge, LLC. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9009963] [13-60038, 13-60039] (CT) [Entered: 03/10/2014 05:15 PM]

* * *

03/17/2014	24	Filed Appellee The Village at Lakeridge, LLC paper copies of supplemental excerpts of record [19] in 1 volume. [9022992] [13-60038,

		13-60039] (CT) [Entered: 03/19/2014 03:34 PM]
04/21/2014	25	Submitted (ECF) Reply Brief for review. Submitted by Appellant U.S. Bank N.A. in 13-60038. Date of service: 04/21/2014. [9066610] [13-60038, 13-60039] (Owens, Keith) [Entered: 04/21/2014 05:56 PM]
04/22/2014	26	Filed clerk order: The reply brief [25] submitted by U.S. Bank N.A. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9067241] [13-60038, 13-60039] (CT) [Entered: 04/22/2014 10:11 AM]

* * *

10/22/2015	45	ARGUED AND SUBMITTED TO RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S.

LASNIK. [9728804] [13-60038, 13-60039] (CB) [Entered: 10/22/2015 01:32 PM]

* * *

02/08/2016	47	FILED OPINION (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) AFFIRMED. Judge: RRC Concurring & dissenting, Judge: NRS Authoring. FILED AND ENTERED JUDGMENT. [9857341] [13-60038, 13-60039] (RMM) [Entered: 02/08/2016 07:02 AM]
02/08/2016	48	Filed memorandum (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) AFFIRMED. [9857344] [13-60038, 13-60039] (RMM) [Entered: 02/08/2016 07:03 AM]
02/22/2016	49	Filed (ECF) Appellant U.S. Bank N.A. in 13-60038, 13-60039 petition for rehearing en banc (from 02/08/2016 opinion). Date of service: 02/22/2016. [9873712] [13-60038, 13-60039] (Owens, Keith) [Entered: 02/22/2016 04:32 PM]

03/16/5016	50	Filed order (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) Judge N.R. Smith has voted to deny the petition for rehearing en banc, and Judge Lasnik has so recommended. Judge Clifton has voted to grant the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [9903452] [13-60038, 13-60039] (WL) [Entered: 03/16/2016 09:46 AM]
03/22/2016	51	Filed (ECF) Appellant U.S. Bank N.A. in 13-60038, 13-60039 Motion to stay the mandate. Date of service: 03/22/2016. [9911797] [13-60038, 13-60039] (Owens, Keith) [Entered: 03/22/2016 06:11 PM]
04/06/2016	52	Filed order (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) It is ordered that the mandate is stayed for 90 days so that Petitioner may file a petition for writ of certiorari in the Supreme Court. If such a petition is filed and the party who obtained the stay so notifies the clerk of this court in writing within the period

		of the stay, the stay shall continue until final disposition by the Supreme Court. See Federal Rule of Appellate Procedure 41(d)(2). [9929032] [13-60038, 13-60039] (WL) [Entered: 04/06/2016 09:20 AM]
06/16/2016	53	Received notice from the Supreme Court: petition for certiorari filed on 06/13/2016. Supreme Court Number 15-1509. [10018567] [13-60038, 13-60039] (RR) [Entered: 06/16/2016 06:32 PM]
03/28/2017	54	Received notice from the Supreme Court. Petition for certiorari GRANTED on 03/27/2017. Supreme Court Number 15-1509. The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted limited to Question 2 presented by the petition. [10373957] [13-60038, 13-60039] (RL) [Entered: 03/28/2017 10:07 AM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

NO. 2013-60039

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK, TRUSTEE, *et al.*, BY AND THROUGH
CWCAPITAL ASSET MANAGEMENT LLC,
SOLELY IN ITS CAPACITY AS SPECIAL
SERVICER,

Appellant,

V.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Date Filed	#	Docket Text
04/26/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes.

Setting schedule as follows: Fee due from Appellant U.S. Bank National Association on 05/10/2013. Mediation Questionnaire due on 05/03/2013. Appellant U.S. Bank National Association opening brief due 07/29/2013. Appellee The Village at Lakeridge, LLC answering brief due 08/27/2013 Appellant's optional reply brief is due 14 days after service of the answering brief. [8606316] (FB) [Entered: 04/26/2013 11:15 AM]

* * *

05/07/2013	4	Received Appellant U.S. Bank National Association notice - statement of issues on appeal and designation of record on appeal . [8620029] (CW) [Entered: 05/07/2013 02:37 PM]

* * *

01/24/2014	15	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant U.S. Bank National Association. Date of service: 01/24/2014. [8952239] (Owens, Keith) [Entered: 01/24/2014 10:13 PM]
01/28/2014	16	Filed (ECF) Appellant U.S. Bank National Association Motion to consolidate cases 13-60039 and 13-

60038. Date of service: 01/28/2014. [8956653]--[COURT UPDATE: Attached corrected motion (includes declaration). Resent NDA. 01/28/2014 by RY] (Owens, Keith) [Entered: 01/28/2014 04:40 PM]

02/03/2014 17 Filed clerk order (Deputy Clerk: AMT): Appellant's unopposed motion to consolidate Nos. 13-60038 and 13-60039 is granted. The consolidated opening brief already received is ordered filed. The consolidated answering brief is due March 7, 2014. The consolidated optional reply brief is due within 14 days after service of the consolidated answering brief. [8962676] [13-60038, 13-60039] (HC) [Entered: 02/03/2014 10:38 AM]

02/03/2014 18 Filed amended clerk order: This order amends the order [8953750-2] filed on January 27, 2014 in No. 13-60038. The opening brief [8952238-2], [15] submitted by U.S. Bank National Association in 13-60038, 13-60039 is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief

is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [8952238-2], [15] submitted by U.S. Bank National Association in 13-60038, 13-60039. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [8964053] [13-60038, 13-60039] (LA) [Entered: 02/03/2014 04:48 PM]

* * *

02/03/2014	20	Filed Appellant U.S. Bank National Association paper copies of excerpts of record [8952238-2], [15] in 4 volume(s). [8966898] [13-60038, 13-60039] (LA) [Entered: 02/05/2014 11:51 AM]
03/07/2014	21	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by - The Village at Lakeridge, LLC in 13-60038, 13-60039. Date of service:

		03/07/2014. [9007965] [13-60038, 13-60039]--[COURT UPDATE: Attached corrected brief. Resent NDA. 03/10/2014 by RY]--[Edited: Edited docket text to reflect correct brief type. 03/10/2014 by RY] (Smith, Alan) [Entered: 03/07/2014 05:47 PM]
03/10/2014	22	Filed clerk order: The answering brief [21] submitted by The Village at Lakeridge, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [21] submitted by The Village at Lakeridge, LLC. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9009963] [13-60038, 13-60039] (CT) [Entered: 03/10/2014 05:15 PM]

* * *

03/17/2014	26	Filed Appellee The Village at Lakeridge, LLC paper copies of supplemental excerpts of record [21] in 1 volume. [9022992] [13-60038, 13-60039] (CT) [Entered: 03/19/2014 03:34 PM]
04/21/2014	27	Submitted (ECF) Reply Brief for review. Submitted by Appellant U.S. Bank N.A. in 13-60038. Date of service: 04/21/2014. [9066610] [13-60038, 13-60039] (Owens, Keith) [Entered: 04/21/2014 05:56 PM]
04/22/2014	28	Filed clerk order: The reply brief [27] submitted by U.S. Bank N.A. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9067241] [13-60038, 13-60039] (CT) [Entered: 04/22/2014 10:11 AM]

* * *

10/22/2015	47	ARGUED AND SUBMITTED TO RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK. [9728804] [13-60038, 13-60039] (CB) [Entered: 10/22/2015 01:32 PM]

* * *

02/08/2016	49	FILED OPINION (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) AFFIRMED. Judge: RRC Concurring & dissenting, Judge: NRS Authoring. FILED AND ENTERED JUDGMENT. [9857341] [13-60038, 13-60039] (RMM) [Entered: 02/08/2016 07:02 AM]
02/08/2016	50	Filed memorandum (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) AFFIRMED. [9857344] [13-60038, 13-60039] (RMM) [Entered: 02/08/2016 07:03 AM]
02/22/2016	51	Filed (ECF) Appellant U.S. Bank N.A. in 13-60038, 13-60039 petition for rehearing en banc (from 02/08/2016 opinion). Date of service:

		02/22/2016. [9873712] [13-60038, 13-60039] (Owens, Keith) [Entered: 02/22/2016 04:32 PM]
03/16/2016	52	Filed order (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) Judge N.R. Smith has voted to deny the petition for rehearing en banc, and Judge Lasnik has so recommended. Judge Clifton has voted to grant the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [9903452] [13-60038, 13-60039] (WL) [Entered: 03/16/2016 09:46 AM]
03/22/20416	53	Filed (ECF) Appellant U.S. Bank N.A. in 13-60038, 13-60039 Motion to stay the mandate. Date of service: 03/22/2016. [9911797] [13-60038, 13-60039] (Owens, Keith) [Entered: 03/22/2016 06:11 PM]
04/06/2016	54	Filed order (RICHARD R. CLIFTON, N. RANDY SMITH and ROBERT S. LASNIK) It is ordered that the mandate is stayed for 90

days so that Petitioner may file a petition for writ of certiorari in the Supreme Court. If such a petition is filed and the party who obtained the stay so notifies the clerk of this court in writing within the period of the stay, the stay shall continue until final disposition by the Supreme Court. See Federal Rule of Appellate Procedure 41(d)(2). [9929032] [13-60038, 13-60039] (WL) [Entered: 04/06/2016 09:20 AM]

06/16/2016 55 Received notice from the Supreme Court: petition for certiorari filed on 06/13/2016. Supreme Court Number 15-1509. [10018567] [13-60038, 13-60039] (RR) [Entered: 06/16/2016 06:32 PM]

03/28/2017 56 Received notice from the Supreme Court. Petition for certiorari GRANTED on 03/27/2017. Supreme Court Number 15-1509. The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted limited to Question 2 presented by the petition. [10373957] [13-60038, 13-60039] (RL) [Entered: 03/28/2017 10:07 AM]

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT,

NO. 2012-1456

IN RE: THE VILLAGE AT LAKERIDGE, LLC, FKA MAGNOLIA VILLAGE, LLC,

Debtor.

THE VILLAGE AT LAKERIDGE, LLC,

Appellant,

V.

U.S. BANK NATIONAL ASSOCIATION; ROBERT RABKIN, MD; UST-UNITED STATES TRUSTEE, RENO,

Appellees.

Date Filed	#	Docket Text
09/05/2012	1	Received NOTICE OF APPEAL filed in Bankruptcy Court on 08/31/2012, NOTICE OF REFERRAL, BK.CT. MEMORANDUM (RE: Notice of Appeal); TRANSMITTAL FORM &

		COPY 08/20/2012 BK.CT. ORDER GRANTING U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS INSIDER CLAIM & (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES. (VB) [Entered: 09/05/2012 01:12 PM]
		* * *
11/05/2012	20	Filed (ECF) Attorney Alan R. Smith, Esquire for Appellant The Village at Lakeridge, LLC's brief on appeal; served on 11/05/2012 email - Attorney for Appellant: Smith; Attorney for Appellees: Bubala, Chubb, Cossitt, Hartman, Nassiri, Owens, Rafatjoo, Strozza, Whitwell. (ARS) [Entered: 11/05/2012 03:17 PM]
11/07/2012	21	Received by Attorney Alan R. Smith for The Village at Lakeridge, LLC in NV-12-1456 & NV-12-1474 (original and 4 copies) - APPELLANT / CROSS-APPELLEE EXCERPTS OF RECORD IN 1 VOLUME, filed on 11/07/2012. Served on 11/05/2012. Appellee / Cross-Appellant Robert Rabkin, U.S. Bank National Association and ust- United States Trustee, Reno's opening brief due

11/26/2012. (NOTE: In reference to this document, the PDF in BAP Pacer System contains only the face sheet, table of contents & certificate of service.) [12-1456, 12-1474] (VB) [Entered: 11/08/2012 10:01 AM]

* * *

11/26/2012	23	Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellant U.S. Bank National Association in 12-1474's second brief on cross-appeal; served on 11/26/2012 email - Attorney for Appellants: Bubala, Owens, Rafatjoo, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 11/26/2012 02:26 PM]

* * *

11/27/2012	25	Received from Attorney Keith Charles Owens for Appellee / Cross-Appellant U.S. Bank National Association (original and 4 copies): APPELLEE / CROSS-APPELLANT'S EXCERPTS OF RECORD IN 2 VOLUMES, filed on 11/27/2012. Served on 11/26/2012. Appellant / Cross-Appellee The

Village at Lakeridge, LLC's reply brief (3rd Brief) due 12/10/2012. (NOTE: Pertaining to this document, PDF in BAP Pacer System contains only the face sheets, table of contents & certificate of service.) [12-1456, 12-1474] (VB) [Entered: 11/27/2012 03:29 PM]

* * *

12/17/2012 31 Filed (ECF) Attorney Alan R. Smith, Esquire for Appellant The Village at Lakeridge, LLC in 12-1456's reply brief on appeal; served on 12/17/2012 email - Attorney for Appellants: Bubala, Chubb, Nassiri, Owens, Rafatjoo, Smith, Whitwell; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (ARS) [Entered: 12/17/2012 03:22 PM]

* * *

01/03/2013 35 Received and filed from Attorney Holly E. Estes for Appellant / Cross-Appellee The Village at Lakeridge, LLC (original and 4 copies) - APPELLANT / CROSS-APPELLEE AMENDED SUPPLEMENTAL APPENDIX. Served on 01/02/2013. [12-1456, 12-

		1474] (VB) [Entered: 01/03/2013 12:45 PM]
01/10/2013	36	Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456's fourth brief on cross-appeal; served on 01/10/2013 email - Attorney for Appellants: Bubala, Owens, Rafatjoo, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 01/10/2013 06:24 PM]
		* * *
03/22/2013	40	ARGUED AND SUBMITTED TO Pappas, Kirscher and Taylor. [12-1456, 12-1474] (EC) [Entered: 03/22/2013 02:04 PM]
		* * *
04/05/2013	42	CLOSED: Case closed: Affirmed in Part, Reverse in part, Vacate in Part & Remand; Terminated on the merits after oral hearing; Written, Unsigned, Unpublished; Pappas, Kirscher and Taylor; 04/05/2013; NV-12-1456; Memorandum. [Edited 04/05/2013 by VB] (VB) [Entered: 04/05/2013 01:51 PM]

04/05/2013	43	FILED AND ENTERED JUDGMENT. [EOD] Date: 04/05/2013. Mandate to issue: 04/26/2013. (VB) [Entered: 04/05/2013 02:18 PM]
04/05/2013	44	LETTER AND DISPOSITION sent to Bankruptcy Court Judge Bruce T. Beesley. [12-1456, 12-1474] (VB) [Entered: 04/05/2013 02:54 PM]
04/05/2013	45	DISPOSITION AND NOTICE OF ENTRY OF JUDGMENT sent to parties and Bankruptcy Clerk. [12-1456, 12-1474] (VB) [Entered: 04/05/2013 03:03 PM]
04/19/2013	46	Notice of Appeal to the 9th Circuit (ECF) filed by Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456; Fee status: Not Paid; Receipt No.: ; served on 04/19/2013 served by: email - Attorney for Appellants: Estes, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 04/19/2013 01:44 PM]
04/23/2013	47	Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in

		12-1456, Attorney Mr. Keith Charles Owens, Esquire for Appellant U.S. Bank National Association in 12-1474's stipulation to stay further action pending appeal; 04/23/2013 served by: email - Attorney for Appellants: Estes, Owens, Smith, Whitwell; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 04/23/2013 01:58 PM]
04/25/2013	48	Filed ORDER (PAPPAS, KIRSCHER and TAYLOR); Stay pending the appeals to the Court of Appeals to maintain the status quo in the underlying chapter 11 case is ordered GRANTED. (See order for details.) [12-1456, 12-1474] (VB) [Entered: 04/25/2013 10:35 AM]
		* * *
04/25/2013	50	NOTICE OF FILING OF APPEAL TO 9TH CIRCUIT sent to Reno, NV Bankruptcy Court. [12-1456, 12-1474] (VB) [Entered: 04/25/2013 12:34 PM]
04/26/2013	51	MANDATE ISSUED to Bankruptcy Court Reno, NV (NVR). (VB) [Entered: 04/26/2013 11:34 AM]

04/26/2013	52	Received 9TH CIRCUIT COURT OF APPEALS CASE NUMBER: 13-60038. (VB) [Entered: 04/26/2013 01:12 PM]
05/03/2013	53	Designation of Record and/or Statement of Issues (ECF) filed for Court of Appeals by Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456; served on 05/03/2013 served by: email - Attorney for Appellants: Owens, Rafatjoo, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 05/03/2013 02:07 PM]

* * *

05/17/2013	55	Designation of Record and/or Statement of Issues (ECF) filed for Court of Appeals by Attorney Holly E. Estes, Esquire for Appellant The Village at Lakeridge, LLC in 12-1456; served on 05/17/2013 served by: email - Attorney for Appellants: Bubala, Owens, Rafatjoo; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (ARS) [Entered: 05/17/2013 04:10 PM]

09/09/2015	56	Record sent to Ninth Circuit on 09/09/2015; orig. [12-1456, 12-1474] (PI) [Entered: 09/09/2015 04:53 PM]
03/28/2017	57	Received from 9th Circuit U.S. Court of Appeals - COPY NOTICE, dated 03/27/2017, RE: Petition for a Writ of Certiorari Granted by the Supreme Court (RE: CA#: 13-60038 / BAP#: NV-12-1456 & CA#: 13-60039 / BAP#: NV-12-1474). (See notice for details.) [12-1456, 12-1474] (VB) [Entered: 03/28/2017 02:08 PM]

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT,

NO. 2012-1474

IN RE: THE VILLAGE AT LAKERIDGE, LLC, FKA MAGNOLIA VILLAGE, LLC,

Debtor.

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

V.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee.

Date Filed	#	Docket Text
09/18/2012	1	Received NOTICE OF CROSS-APPEAL filed in Bankruptcy Court on 09/14/2012, NOTICE OF REFERRAL, BK.CT. MEMORANDUM (RE: Notice of Cross-Appeal), TRANSMITTAL FORM & COPY 08/20/2012 BK.CT. ORDER GRANTING U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS INSIDER

CLAIM & (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES. (VB) [Entered: 09/19/2012 09:42 AM]

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11/07/2012	14	Received by Attorney Alan R. Smith for The Village at Lakeridge, LLC in NV-12-1456 & NV-12-1474 (original and 4 copies) - APPELLANT / CROSS-APPELLEE EXCERPTS OF RECORD IN 1 VOLUME, filed on 11/07/2012. Served on 11/05/2012. Appellee / Cross-Appellant Robert Rabkin, U.S. Bank National Association and ust- United States Trustee, Reno's opening brief due 11/26/2012. (NOTE: In reference to this document, the PDF in BAP Pacer System contains only the face sheet, table of contents & certificate of service.) [12-1456, 12-1474] (VB) [Entered: 11/08/2012 10:01 AM]
11/26/2012	15	Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellant U.S. Bank National Association in 12-1474's second brief on cross-appeal; served on 11/26/2012 email - Attorney for Appellants: Bubala, Owens, Rafatjoo, Smith; Attorney for Appellees: Cossitt,

Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 11/26/2012 02:26 PM]

* * *

11/26/2012 17 Received from Attorney Keith Charles Owens for Appellee / Cross-Appellant U.S. Bank National Association (original and 4 copies): APPELLEE / CROSS-APPELLANT'S EXCERPTS OF RECORD IN 2 VOLUMES, filed on 11/27/2012. Served on 11/26/2012. Appellant / Cross-Appellee The Village at Lakeridge, LLC's reply brief (3rd Brief) due 12/10/2012. (NOTE: Pertaining to this document, PDF in BAP Pacer System contains only the face sheets, table of contents & certificate of service.) [12-1456, 12-1474] (VB) [Entered: 11/27/2012 03:29 PM]

* * *

12/17/2012 22 Filed (ECF) Attorney Alan R. Smith, Esquire for Appellant The Village at Lakeridge, LLC in 12-1456's reply brief on appeal; served on 12/17/2012 email - Attorney for Appellants: Bubala, Chubb, Nassiri, Owens,

Rafatjoo, Smith, Whitwell; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (ARS) [Entered: 12/17/2012 03:22 PM]

* * *

01/03/2013 26 Received and filed from Attorney Holly E. Estes for Appellant / Cross-Appellee The Village at Lakeridge, LLC (original and 4 copies) - APPELLANT / CROSS-APPELLEE AMENDED SUPPLEMENTAL APPENDIX. Served on 01/02/2013. [12-1456, 12-1474] (VB) [Entered: 01/03/2013 12:45 PM]

01/10/2013 27 Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456's fourth brief on cross-appeal; served on 01/10/2013 email - Attorney for Appellants: Bubala, Owens, Rafatjoo, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 01/10/2013 06:24 PM]

* * *

03/22/2013	30	ARGUED AND SUBMITTED TO Pappas, Kirscher and Taylor. [12-1456, 12-1474] (EC) [Entered: 03/22/2013 02:04 PM]

* * *

04/05/2013	32	CLOSED: Case closed: Affirmed in Part, Vacated in Part; Terminated on the merits after oral hearing; Written, Unsigned, Unpublished; Pappas, Kirscher and Taylor; 04/05/2013; NV-12-1474; Memorandum. (VB) [Entered: 04/05/2013 02:07 PM]
04/05/2013	33	FILED AND ENTERED JUDGMENT. [EOD] Date: 04/05/2013. Mandate to issue: 04/26/2013. (VB) [Entered: 04/05/2013 02:42 PM]
04/05/2013	34	LETTER AND DISPOSITION sent to Bankruptcy Court Judge Bruce T. Beesley. [12-1456, 12-1474] (VB) [Entered: 04/05/2013 02:54 PM]
04/05/2013	35	DISPOSITION AND NOTICE OF ENTRY OF JUDGMENT sent to parties and Bankruptcy Clerk. [12-1456, 12-1474] (VB) [Entered: 04/05/2013 03:03 PM]

04/19/2013	36	Notice of Appeal to the 9th Circuit (ECF) filed by Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456; Fee status: Not Paid; Receipt No.: ; served on 04/19/2013 served by: email - Attorney for Appellants: Estes, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 04/19/2013 01:44 PM]
04/23/2013	37	Filed (ECF) Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456, Attorney Mr. Keith Charles Owens, Esquire for Appellant U.S. Bank National Association in 12-1474's stipulation to stay further action pending appeal; 04/23/2013 served by: email - Attorney for Appellants: Estes, Owens, Smith, Whitwell; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 04/23/2013 01:58 PM]
04/25/2013	38	Filed ORDER (PAPPAS, KIRSCHER and TAYLOR); Stay pending the appeals to the Court of Appeals to maintain the status quo in the underlying chapter 11 case

		is ordered GRANTED. (See order for details.) [12-1456, 12-1474] (VB) [Entered: 04/25/2013 10:35 AM]
04/25/2013	39	CERTIFICATE OF RECORD filed and served as of 04/25/2013. Notice of Appeal transmitted to parties. Copy forwarded to 9th Circuit. (VB) [Entered: 04/25/2013 12:14 PM]
04/25/2013	40	NOTICE OF FILING OF APPEAL TO 9TH CIRCUIT sent to Reno, NV Bankruptcy Court. [12-1456, 12-1474] (VB) [Entered: 04/25/2013 12:34 PM]
04/26/2013	41	MANDATE ISSUED to Bankruptcy Court Reno, NV (NVR). (VB) [Entered: 04/26/2013 11:51 AM]
04/26/2013	42	Received 9TH CIRCUIT COURT OF APPEALS CASE NUMBER: 13-60039. (VB) [Entered: 04/26/2013 01:14 PM]
05/03/2013	43	Designation of Record and/or Statement of Issues (ECF) filed for Court of Appeals by Attorney Mr. Keith Charles Owens, Esquire for Appellee U.S. Bank National Association in 12-1456; served on 05/03/2013 served by: email - Attorney for Appellants: Owens,

		Rafatjoo, Smith; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (KCO) [Entered: 05/03/2013 02:07 PM]
05/17/2013	44	Designation of Record and/or Statement of Issues (ECF) filed for Court of Appeals by Attorney Holly E. Estes, Esquire for Appellant The Village at Lakeridge, LLC in 12-1456; served on 05/17/2013 served by: email - Attorney for Appellants: Bubala, Owens, Rafatjoo; Attorney for Appellees: Cossitt, Hartman, Strozza. [12-1456, 12-1474] (ARS) [Entered: 05/17/2013 04:10 PM]
09/09/2015	45	Record sent to Ninth Circuit on 09/09/2015; orig. [12-1456, 12-1474] (PI) [Entered: 09/09/2015 04:53 PM]
03/28/2017	46	Received from 9th Circuit U.S. Court of Appeals - COPY NOTICE, dated 03/27/2017, RE: Petition for a Writ of Certiorari Granted by the Supreme Court (RE: CA#: 13-60038 / BAP#: NV-12-1456 & CA#: 13-60039 / BAP#: NV-12-1474). (See notice for details.) [12-1456, 12-1474] (VB) [Entered: 03/28/2017 02:08 PM]

U.S. BANKRUPTCY COURT
DISTRICT OF NEVADA (RENO)

IN RE:

THE VILLAGE AT LAKERIDGE, LLC
AKA MAGNOLIA VILLAGE, LLC,

Debtor.

CIVIL DOCKET FOR PETITION #: 11-51994-BTB

Date Filed	#	Docket Text
06/16/2011	1	Chapter 11 Voluntary Petition. Fee Amount $1039. Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 06/16/2011)
		* * *
06/16/2011	5	*Corporate Resolution* Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 06/16/2011)
		* * *
09/14/2011	47	Disclosure Statement Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE,

		LLC (SMITH, ALAN) (Entered: 09/14/2011)
09/14/2011	48	Chapter 11 Plan of Reorganization #1 Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 09/14/2011)
		* * *
11/04/2011	76	Amendment to Section 7.3 of Debtor's Plan of Reorganization Filed by ALAN R. SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 48 Chapter 11 Plan #1 filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (SMITH, ALAN) (Entered: 11/04/2011)
		* * *
11/04/2011	78	Assignment/Transfer of Claim filed by THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 11/04/2011)
		* * *
11/16/2011	82	*First Amended* Disclosure Statement Filed by ALAN R SMITH on

behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 11/16/2011)

* * *

11/23/2011	84	Order Approving Debtor's First Amended Disclosure Statement. Confirmation hearing to be held on 2/2/2012 at 09:30 AM at BTB RN-Courtroom 2, Young Bldg.. (Related document(s) 82 Disclosure Statement filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (dlm) (Entered: 11/23/2011)

* * *

12/20/2011	95	Amended Order Approving Debtor's First Amended Disclosure Statement. Confirmation hearing to be held on 3/23/2012 at 10:00 AM at BTB RN-Courtroom 2, Young Bldg.. (Related document(s) 82 Disclosure Statement filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (lms) (Entered: 12/20/2011)

* * *

01/12/2012	108	Stipulation By THE VILLAGE AT LAKERIDGE, LLC and

Between U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE REGISTERED HOLDERS OF GREENWICH CAPITAL COMMERCIAL FUNDING CORP., COMMERCIAL MORTGAGE TRUST 2005-GG3, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-GG3 Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 48 Chapter 11 Plan #1 filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (SMITH, ALAN) (Entered: 01/12/2012)

01/12/2012	109	Amended Chapter 11 Plan Number One Second Amendment to Plan Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 48 Chapter 11 Plan #1 filed by Debtor THE VILLAGE AT LAKERIDGE, LLC)(SMITH, ALAN) Modified on 1/13/2012

to relate to #48 (Wenszell, GL). Modified on 1/13/2012 to remove SARD statistical data. (Wenszell, GL). (Entered: 01/12/2012)

* * *

07/01/2012 194 Application *U.S. BANKS MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(E), 1129(A) AND 105(A)* Filed by LOUIS M. BUBALA III on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (BUBALA, LOUIS) (Entered: 07/01/2012)

* * *

07/01/2012 198 Declaration Of: KEITH C. OWENS Filed by LOUIS M. BUBALA III on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A.,

AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 194 Miscellaneous Application filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION) (Attachments: # 1 Exhibit 1, Part 1 # 2 Exhibit 1, Part 2 # 3 Exhibit 1, Part 3 # 4 Exhibit 1, Part 4 # 5 Exhibit 1, Part 5 # 6 Exhibit 1, Part 6 # 7 Exhibit 2) (BUBALA, LOUIS) (Entered: 07/01/2012)

* * *

07/13/2012 213 Opposition Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 194 Miscellaneous Application filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL

ASSOCIATION.) (Attachments: # 1 Exhibit A) (SMITH, ALAN) (Entered: 07/13/2012)

07/13/2012 214 Declaration Of: Robert Rabkin Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 213 Opposition filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (SMITH, ALAN) (Entered: 07/13/2012)

* * *

07/18/2012 218 Reply *U.S. Bank's Reply in Support of Motion to (A) Designate Claim of Robert Rabkin as Insider Claim and (B) Disallow Such Claim for Voting Purposes Pursuant to 11 U.S.C. Section 1126(e)* Filed by KEITH C. OWENS on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 194 Miscellaneous Application filed by Creditor U.S. BANK NATIONAL ASSOCIATION,

AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.) (OWENS, KEITH) (Entered: 07/18/2012)

* * *

07/19/2012 222 Opposition *Objection to Confirmation of Debtor's Plan of Reorganization* Filed by HAMID R. RAFATJOO on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 48 Chapter 11 Plan #1 filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (RAFATJOO, HAMID) (Entered: 07/19/2012)

07/19/2012 223 Declaration Of: Hamid R. Rafatjoo *in Support of Objection to Confirmation of Debtor's Plan of Reorganization* Filed by HAMID R. RAFATJOO on behalf of U.S. BANK NATIONAL ASSOCIATION,

AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 222 Opposition filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION) (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 - Part 1 of 6 # 3 Exhibit 2 - Part 2 of 6 # 4 Exhibit 2 - Part 3 of 6 # 5 Exhibit 2 - Part 4 of 6 # 6 Exhibit 2 - Part 5 of 6 # 7 Exhibit 2 - Part 6 of 6) (RAFATJOO, HAMID) (Entered: 07/19/2012)

* * *

07/20/2012 227 Amended Request for Judicial Notice *in Support of Objection to Confirmation of Debtor's Plan of Reorganization* Filed by HAMID R. RAFATJOO on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF

AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Attachments: # 1 Exhibit A - Part 1 of 2 # 2 Exhibit A - Part 2 of 2 # 3 Exhibit B # 4 Exhibit C # 5 Exhibit D # 6 Exhibit E # 7 Exhibit F # 8 Exhibit G) (RAFATJOO, HAMID) (Entered: 07/20/2012)

07/23/2012 228 Supplement *Notice of Supplemental Authority Regarding U.S. Bank's Motion to (a) Designate Claim of Robert B. Rabkin as an Insider Claim or (b) Disallow Such Claim for Voting Purposes Pursuant to 11 U.S.C. 1126(e), 1129(a) and 105(a)* Filed by LOUIS M. BUBALA III on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 194 Miscellaneous Application filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A.,

AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION) (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3) (BUBALA, LOUIS) (Entered: 07/23/2012)

* * *

07/26/2012 234 Reply Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 222 Opposition filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.) (SMITH, ALAN) (Entered: 07/26/2012)

* * *

07/27/2012 237 Declaration Of: Tod W. Little *In Support* Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 234 Reply filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (SMITH, ALAN) (Entered: 07/27/2012)

* * *

07/30/2012	240	Ballot Summary Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 07/30/2012)

* * *

07/30/2012	243	Supplemental Brief Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 213 Opposition filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (SMITH, ALAN) (Entered: 07/30/2012)

* * *

08/02/2012	246	Stipulation and Order as to Value of the Lender's Total Allowed Claim, Resolving Amended Objection to Claim of US Bank, and Vacating the Hearing Thereon. (Related document(s) 86 Objection to Claim filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (lms) (Entered: 08/02/2012)

* * *

08/20/2012	254	Order Granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as Insider Claim and (B) Disallow Such Claim For Voting Purposes (Related document(s) 194) (cly) (Entered: 08/20/2012)
08/29/2012	255	Transcript regarding Hearing Held on 08/01/12. The transcript may be viewed at the Bankruptcy Court Clerk's Office. For additional information, you may contact the Transcriber Avtranz, Telephone number 602-263-0885. Purchasing Party: Smith, Alan R.. Redaction Request Due By 09/19/2012. Redacted Transcript Submission Due By 10/1/2012. Transcript access will be restricted through 11/27/2012. (AVTRANZ) (Entered: 08/29/2012)
08/30/2012	256	Notice of Filing Official Transcript. (Related document(s) 255 Transcript) (cly) (Entered: 08/30/2012)
08/31/2012	257	Notice of Appeal. Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC. Fee Amount $298 Appellee designation due by 09/14/2012. (Related document(s) 254 Order on Miscellaneous Application.)(SMITH, ALAN) (Entered: 08/31/2012)

* * *

09/04/2012	260	Appeal Reference Number 12-09 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (mag) (Entered: 09/04/2012)
09/04/2012	261	Notice of Referral of Appeal to BAP. Appeal Reference # 12-09 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(mag) (Entered: 09/04/2012)
09/04/2012	262	Transmittal Form (BAP). Appeal Reference # 12-09 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(mag) (Entered: 09/04/2012)
09/04/2012	263	Appeal Memorandum. Appeal Reference # 12-09 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(mag) (Entered: 09/04/2012)
09/04/2012	264	Clerk Forwarded Appeal Documents to BNC for Noticing to: BAP (Related document(s) 257 Notice

of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (mag) (Entered: 09/04/2012)

09/05/2012 265 BAP Appeal Court Case # NV-12-1456 Appeal Reference # 12-09 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.) (mag) (Entered: 09/05/2012)

* * *

09/14/2012 277 Appellant Statement of Issues. Appeal Reference # 12-09 Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(SMITH, ALAN) (Entered: 09/14/2012)

09/14/2012 278 Appellant Designation of Record. Appeal Reference # 12-09 Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(SMITH, ALAN) (Entered: 09/14/2012)

09/14/2012	279	Cross Appeal. Filed by KEITH C. OWENS on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION Fee Amount $298. (Attachments: # 1 Appendix A # 2 Exhibit B) (Related document(s) 203 Order, 254 Order on Miscellaneous Application (OWENS, KEITH) Modified on 9/17/2012 to relate to #203 & #254 (DeVaney, HA). (Entered: 09/14/2012)

* * *

09/17/2012	281	Notice of Referral of Cross Appeal to BAP. Appeal Reference #12-10 (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 09/17/2012)

09/17/2012	282	Transmittal Form (BAP). Appeal Reference #12-10 (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 09/17/2012)
09/17/2012	283	Cross Appeal Memorandum. Appeal Reference #12-10 (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 09/17/2012)
09/17/2012	284	Clerk Forwarded Cross Appeal Documents to BNC for Noticing to: BAP (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE,

SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 09/17/2012)

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09/19/2012 288 BAP Appeal Court Case #NV-12-1474, Appeal Reference #12-10 (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 09/19/2012)

* * *

09/28/2012 297 Appellee Statement of Issues. Appeal Reference # 12-09 and 12-10 BAP # NV-12-1456 and NV 12-1474 *Statement of Issues on Cross-Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8006 (with Certificate of Service)* Filed by KEITH C. OWENS on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR

IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.) (OWENS, KEITH) (Entered: 09/28/2012)

09/28/2012 298 Appellee Designation of Record. Appeal Reference # 12-09 and 12-10 BAP # NV-12-1456 and NV-12-1474 *Designation of Record on Cross-Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8006 (with Certificate of Service)* Filed by KEITH C. OWENS on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (Related document(s) 279 Cross Appeal filed

by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.) (OWENS, KEITH) (Entered: 09/28/2012)

* * *

10/08/2012 309 Transcript regarding Hearing Held on 09/26/12. The transcript may be viewed at the Bankruptcy Court Clerk's Office. For additional information, you may contact the Transcriber AVTranz, Telephone number 605-263-0885. Purchasing Party: Alan R Smith. Redaction Request Due By 10/29/2012. Redacted Transcript Submission Due By 11/8/2012. Transcript access will be restricted through 01/6/2013. (AVTRANZ) (Entered: 10/08/2012)

* * *

10/09/2012 310 Notice of Filing Official Transcript. (Related document(s) 309 Transcript) (cly) (Entered: 10/09/2012)

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10/12/2012	312	Supplemental Appellee Designation of Record. Appeal Reference # 12-09, 12-10 BAP # 12-1456, 12-1474 Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC., (279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(SMITH, ALAN) Modified on 10/16/2012 to Also Relate to #257 (Lakas, WM). (Entered: 10/12/2012)
10/16/2012	313	Certificate of Readiness Forwarded to: BAP. Appeal Reference #12-09, BAP #NV-12-1456 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC.)(mrb) (Entered: 10/16/2012)

10/16/2012	314	Certificate of Readiness Forwarded to: BAP. Appeal Reference #12-10, BAP #NV-12-1474 (Related document(s) 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mrb) (Entered: 10/16/2012)

* * *

10/31/2012	317	Notice *Of Stay Pending Appeal* Filed by ALAN R SMITH on behalf of THE VILLAGE AT LAKERIDGE, LLC (SMITH, ALAN) (Entered: 10/31/2012)

* * *

04/29/2013	336	(COPY) Order Granting Stay Pending Appeal to the Court of Appeals. Appeal Reference # 12-09 and 12-10 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC and (Related document(s) 279 Cross Appeal.)(mag) (Entered: 05/08/2013)

05/06/2013	334	Appeal Closed, Appeal Reference Number 12-09; Cross Appeal Closed, Appeal Reference Number 12-10 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC and 259 Cross Appeal) (mrb) Modified on 5/9/2013 APPEAL CLOSED IN ERROR (Burks, LG). (Entered: 05/06/2013)
05/06/2013	335	Notice *of Stay Pending Appeal* with Certificate of Service Filed by KEITH C. OWENS on behalf of U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION (OWENS, KEITH) (Entered: 05/06/2013)
05/08/2013	337	Ninth Circuit Appeal Court Case # 13-60038 - Appeal Reference No. 12-09 and 13-60039 Appeal Reference 12-10 (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC, 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION,

AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mag) (Entered: 05/08/2013)

* * *

02/10/2016 410 (COPY) OPINION - Ninth Circuit Appeal Court Case # 13-60038 - Appeal Reference No. 12-09 and 13-60039 Appeal Reference 12-10. (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC, 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mag) (Entered: 02/10/2016)

02/10/2016 411 (COPY) MEMORANDUM. Ninth Circuit Appeal Court Case # 13-60038 - Appeal Reference No. 12-09 and 13-60039 Appeal Reference 12-10. (Related document(s) 257

		Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC, 279 Cross Appeal filed by Creditor U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION.)(mag) (Entered: 02/10/2016)

* * *

05/11/2016	418	Appeal Closed. (Related document(s) 257 Notice of Appeal filed by Debtor THE VILLAGE AT LAKERIDGE, LLC) (mag) (Entered: 05/11/2016)

* * * *

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. BK-N-11-51994-BTB
Chapter 11

In Re: THE VILLAGE AT LAKERIDGE, LLC,
a Nevada limited liability company,

Debtor.

NOTICE OF ASSIGNMENT OF CLAIM

[No Hearing Required]

NOTICE IS HEREBY GIVEN that Robert Alan Rabkin has acquired the claim of MBP Equity Partners 1, LLC, against the Debtor.

NOTICE IS FURTHER GIVEN that all future papers and notices regarding the claim shall be served on:

Robert Alan Rabkin
4790 Caughlin Pkwy #375
Reno, NV 89519

DATED this 4th day of November, 2011.

LAW OFFICES OF ALAN R. SMITH

By */s/ Alan R. Smith*
ALAN R. SMITH
Attorney for Cleve Canepa

ASSIGNMENT OF CREDITOR'S CLAIM

For the sum of $5,000.00 (the "Purchase Price"), the undersigned hereby assigns and transfers to Robert Alan Rabkin, all right, title and interest in that certain claim against The Village at Lakeridge, LLC, a Chapter 11 debtor in Bankruptcy Case No. BK-N-11-51994 (the "Case"), and all right to payment thereunder, said claim being in the scheduled amount of $2,761,000, (the "Claim"). Assignment is only for future distributions, if any.

This Assignment constitutes and embodies the complete understanding and agreement of the parties hereto. Undersigned warrants that the claim in the amount of $2,761,000 is valid, and has not previously been assigned, transferred or pledged to another person or entity, that undersigned owns and has title to the Claim free and clear of any and all liens, security interests or encumbrances, and that all payments on the claim have been credited and deducted.

Assignor is aware that the above Purchase Price may differ from the amount ultimately to be distributed in the Case with respect to the Claim. Assignor acknowledges that, except as set forth in this Assignment, neither Assignee nor any agent or representative of Assignee has made any representations whatsoever to Assignor regarding the status of the Case, the condition of the Debtor (financial or otherwise) or any other matter relating to the Case, the Debtor or the Claim. Assignor represents that it has adequate information concerning the business and financial condition of the Debtor and the status of the

Case to make an informed decision regarding the sale of the Claim, and that it has independently and without reliance on Assignee, and based on such information as Assignor has deemed appropriate (including information available from the files of the court in the Case), made its own analysis and decision to enter into this Assignment of Claim. Undersigned waives right to receive any further notices in the Case.

Assignor is aware that the purchase price for the Claim may differ from the amount ultimately to be distributed in the bankruptcy case with respect to the Claim, and waives all future right to payment on account of this Assignment.

This Assignment becomes effective upon endorsement of the check enclosed herewith, regardless of whether or not this Assignment is executed.

DATED this 27th day of October, 2011.

ASSIGNOR

MBP EQUITY PARTNERS 1, LLC

By *__/s/ Judith Fountain__*
It's Authorized Agent

Title: Member of the Board of Managers

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. 11-51994-BTB

Chapter 11

In re:

THE VILLAGE AT LAKERIDGE, LLC
AKA MAGNOLIA VILLAGE, LLC,

Debtor.

U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(e), 1129(a) and 105(a)

Hearing Date: OST Requested
Hearing Time: OST Requested

U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3, by and through, CWCapital Asset Management LLC, solely in its capacity as Special Servicer (hereinafter referred to as the "*Lender*"), hereby moves this Court to: (a) designate the claim (the "*Insider Claim*" or the "*Rabkin Claim*")

of Robert Rabkin ("*Rabkin*") as an insider claim; or (b) disallow the Insider Claim for voting purposes pursuant to 11 U.S.C. §§ 1126(e), 1129(a) and 105(a).

In support of the Motion, the Lender states as follows:

INTRODUCTION

The Village at Lakeridge, LLC (the "*Debtor*") filed this commercial real estate bankruptcy case to stay a pending foreclosure proceeding. The Debtor's bankruptcy case is a two-party dispute between the Debtor and the Lender. In fact, the Lender filed the only proof of claim in this bankruptcy case. Under the Debtor's plan of reorganization (the "Plan"), the only other alleged prepetition creditors are (a) certain tenants that provided security deposits (the "*Tenant Security Deposit Claims*") to the Debtor,[1] and (b) the Debtor's Managing Member MBP Equity Partners I, LLC ("*MBP*"). MBP's claim relates to an alleged insider loan of $2,761,000.00 which predates the Debtor's prior bankruptcy filing as well.

1. Because the Debtor is assuming all of its leases, the tenants are not entitled to vote on the Plan. The Lender is objecting to the Tenant Security Deposit Claims by separate motion filed concurrently herewith (the "*Security Deposit Motion*").

Prior to the Court's approval of the Disclosure Statement in this case, the Debtor and MBP collaborated to assign MBP's insider claim to Rabkin. The sole purpose of the assignment of the Insider Claim was to gerrymander the votes needed to create an "impaired" consenting class of creditors to confirm a plan over Lender's objection. As discussed below, such manipulation of classification without any rehabilitative purpose is indicative of bad faith. *See, e.g., In re Hotel Associates of Tucson*, 165 B.R. 470 (B.A.P. 9th Cir. 1994) (remanding for a determination of the debtor's good faith, instructing the bankruptcy court to "recognize that the act of impairment in an attempt to gerrymander a voting class of creditors is indicative of bad faith.").[2]

As a result, the Insider Claim was sold to Rabkin for $5,000.00. Through discovery, the Lender has learned that not only is Rabkin a non-statutory insider due to his romantic relationship with Kathie Bartlett who is the managing member of MBP and the Debtor, but he is also a straw man for the Debtor whose sole purpose is to vote to accept the Plan.

As set forth in greater detail below, the Court should grant this Motion because: (i) the Insider Claim does

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2. Indeed, as discussed below, while the Lender's attempt to purchase Rabkin's claim "for the purpose of protecting [its] own existing claim does not demonstrate bad faith or an ulterior motive," *In re Figter Limited*, 118 F.3d 635, 639 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 561 (1997), improper classification of a claim as "impaired" for the purpose of cramdown is indicative of bad faith. *See In re Hotel Associates*, 165 B.R. 470.

not lose its insider status simply because it was sold to Rabkin; (ii) Rabkin's vote should not be counted as Rabkin is a non-statutory insider; and (iii) the Insider Claim is disallowed for voting purposes due to the bad faith of the Debtor and Rabkin.

Based on the foregoing and the Security Deposit Motion, the Plan is unconfirmable as there are no impaired consenting classes of creditors. The Lender has filed this Motion prior to the ballot deadline in order to prevent the parties from embarking on a contested and expensive confirmation process when the Debtor has no ability to confirm its Plan.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bankruptcy Filing

1. On June 16, 2011 (the "*Petition Date*"), the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*"), thereby commencing this bankruptcy case (the "*Case*"). This is the Debtor's second bankruptcy. The prior bankruptcy was filed on September 8, 2006 under the name Magnolia Village, LLC.

2. As evidenced by the only Proof of Claim filed in this Case, the Lender has a secured claim in the amount of at least $21,860,052.37 against the Debtor's bankruptcy estate. The Lender's claim is secured by first priority, perfected liens on substantially all of Debtor's assets, including the real property and improvements with a

common address of 6900-6990 South McCarran Boulevard, Reno, Nevada, 89509 (the "*Property*") and proceeds and cash collateral derived therefrom. In addition, the Lender holds an absolute assignment of rents. For purposes of confirmation, the Debtor and the Lender stipulated that the value of the Property is $10,800,000. *See* Stipulation as to Value of Property at Plan Confirmation [Docket No. 108] (the "*Stipulation*").

3. On September 14, 2011, the Debtor filed its Disclosure Statement [Docket No. 47] (as amended, the "*Disclosure Statement*") and its initial Plan of Reorganization (the "*Plan*"). The Debtor modified its initial Plan on November 4, 2011 [Docket No. 76] and January 12, 2012 [Docket No. 109]. The proposed treatment under the Plan can be summarized as follows:

- *Class 1—Secured Claim of U.S. Bank*: Despite the Lender's Bankruptcy Code § 1111(b) election, the Debtor would issue a new note in the amount of the value of the Property with a ten-year term, a balloon payment at the end of the term, an interest rate of 4.25%, and amortizing payments based on a thirty-year term. The new note would be secured by the Property, and the interest payable to the Lender would be capped by the Debtor's "Monthly Net Income," the consequence of which is that the note to the Lender would be subject to negative amortization. Alternatively, the Debtor would provide the Lender U.S.

Treasury Bonds with a present value of $10,800,000 and a stream of payments equal to the amount owing under the Lender's loan documents. Contrary to the requirements of Bankruptcy Code § 1111(b), the Lender would be required to release its lien upon receipt of the U.S. Treasury Bonds.

- *Class 2—U.S. Bank Deficiency Claim*: As a result of the Lender's election pursuant to Bankruptcy Code § 1111(b), this class is now moot.

- *Class 3—Unsecured Claims*: The Class 3 claimant, Robert Rabkin, an individual who took an assignment of the Insider Claim held by the Debtor's equity owner, and the Tenant Security Deposit Claims, would receive $30,000.00 on the effective date of the Plan.

- *Class 4 Membership Interests*: Despite not providing any capital contribution, the Debtor's member will retain its membership interest.

ASSIGNMENT OF INSIDER CLAIM

4. On or about October 27, 2011, MBP sold and assigned the Insider Claim in the amount of $2,761,000.00 to Rabkin for $5,000.00. The Assignment occurred 11 days prior to November 7, 2011 hearing on the Disclosure Statement. *See* Notice of Assignment of Claim (Docket No. 78).

5. The Plan has classified the Rabkin Claim as a Class 3 general unsecured claim that would be entitled to share a single distribution in the amount of $30,000.00 on a *pro rata* basis with general unsecured creditors. *See* Second Amendment to Debtor's Plan of Reorganization, at 2, § 4.3 (Docket No. 109). Because the other general unsecured creditors are the Debtor's tenants whose leases are being assumed, there are no other general unsecured claims. Therefore, Rabkin will recover the entire $30,000 distribution.

6. On June 7, 2012, the Lender took Rabkin's deposition to learn about his interest in this case (the "Rabkin Deposition").

7. Rabkin testified that he purchased the Insider Claim for $5,000.00 as a "business investment,"[3] and that other than getting paid the $30,000.00 offered to unsecured creditors under the Plan, he had "no other interest in the Village at Lakeridge."[4] Rabkin also testified that he understood that the maximum amount that he would recover in the Debtor's bankruptcy was $30,000.00 in accordance with the terms of the Plan, and that he understood that there was a risk that he would get paid nothing at all if the Plan was not confirmed.[5]

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3. *Id.* at p. 75:16-25.

4. *Id.* at p. 82:3-14.

5. *Id.* at p. 75:4-20.

8. At the conclusion of the Rabkin Deposition, Lender offered to purchase the Insider Claim for $50,000.00, and proffered a cashier's check in the amount of $50,000.00, along with an Assignment of Claim Agreement.[6] The Assignment of Claim Agreement provided that the Lender's purchase of the Insider Claim was on an "as is, where is" basis with no representations or warranties other than that Rabkin owned the Insider Claim and had not transferred or assigned the claim. It specifically stated that Lender would not have any recourse against Rabkin if the Lender recovered less than $30,000.00, or nothing at all, if the Court denied Plan confirmation, or if the Insider Claim was disallowed.[7] In other words, Rabkin would immediately be paid $20,000 more than the maximum amount under the Plan without any risk.

9. Rabkin responded that he would "consider" the offer but failed to accept the offer in direct contradiction to his testimony that his purchase of the Insider Claim was a pure "business investment" and that he had "no other interest in the Village at Lakeridge."

10. As evidenced by his action, Rabkin is not a third party investor looking for an economic gain. Not only did

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6. *Id.* at p. 84:6 - 87:18. *See also* Exhibit "2" to the Owens Declaration. The offer was not an offer in compromise as the Lender and Rabkin do not have any claims against one another. Rather, the offer was intended to acquire a claim to protect Lender's interest as a secured creditor, which is permitted in the Ninth Circuit. *See In re Figter Limited*, 118 F.3d 635, 639 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 561 (1997).

7. *See* Exhibit "2" to the Owens Declaration.

Rabkin not accept a 66% greater recovery, but he did not make a counter offer to the Lender's $50,000 offer.

11. Rabkin is a shill for the Debtor.[8] He has had a long term personal friendship with Kathie Bartlett[9] and has a romantic relationship with Ms. Bartlett.[10] He did not purchase the Insider Claim as a business investment. He performed no due diligence in connection with the purchase of the Insider Claim. He was directed by his girlfriend to purchase her claim and vote to accept the Plan.

12. The Debtor's representative is making a mockery of the Chapter 11 process by attempting to confirm a Plan by selling MBP's insider claim to her boyfriend, and calling it an impaired consenting class. The Motion must be granted.

RELIEF REQUESTED

By this Motion, Lender requests that the Court rule (a) the Insider Claim does not lose its insider status because it

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8. The Debtor has not bothered to serve Rabkin with a single document in this case and Rabkin has not requested service of any documents.

9. *See* Exhibit "1: to the Owens Declaration; Tr. of Deposition of Robert Alan Rabkin, at pp. 42:1-25 to 44:12. Ms. Bartlett was the "Person Most Knowledgeable" designated by the Debtor and MBP, serving as both the Debtor's "Responsible Person" and MBP's Managing Member.

10. *Id.* at p. 98:14-18.

was sold to Rabkin: (b) Rabkin is a non-statutory insider because of his relationship with the Debtor's insider; and (c) the Insider Claim is disallowed for voting purposes under Sections 1126(e) and 105(a) of the Bankruptcy Code due to the bad faith of the Debtor and Rabkin.

BASIS FOR RELIEF REQUESTED

A. The Rabkin Claim Cannot be Considered in Determining Whether There is an Accepting Class Pursuant to Sections 1126(e), 1129(a) and 105(a) of the Bankruptcy Code

Section 1126(e) of the Bankruptcy Code provides: "On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." 11 U.S.C. § 1126(e). Bankruptcy courts are empowered to decide a preemptory motion to disallow ballots of a creditor prior to plan confirmation. *See In re Kovalchick*, 175 B.R. 863, 874 (Bankr. E.D. Pa. 1994) (considering motion to designate claim prior to plan confirmation); *In re Pleasant Hill Partners, L.P.*, 163 B.R. 388, 389 (Bankr. N.D. Ga. 1994) (same).

In the instant case, the Rabkin Claim should be disallowed for voting purposes on the grounds that his vote would not be consistent with his self-interest as a creditor and constitutes bad faith. Specifically, the Debtor and MBP have attempted to manipulate the plan confirmation

process by selling the MBP's Insider Claim to Rabkin (who was not a pre-existing creditor) for a nominal amount and attempting to use the Insider Claim to artificially create an impaired consenting class for purposes of confirming a cramdown plan over Lender's objection. Additionally, Rabkin's testimony regarding his close friendship and romantic relationship with Ms. Bartlett, his stated inability to recall any of the material circumstances regarding his purchase of the Insider Claim, and his failure to conduct any due diligence concerning the purchase of the Insider Claim, combined with Rabkin's rejection of Lender's offer to purchase the Insider Claim for $20,000.00 more than Rabkin would otherwise receive if the Insider Claim is ultimately allowed and the Plan is confirmed, reveals that MBP's assignment of the Insider Claim to Rabkin was done in bad faith, and was solely designed to artificially create an impaired consenting class and is an effort to gain an unfair advantage over the Lender. Accordingly, the Court should disallow the Insider Claim for voting purposes under Sections 1126(e), 1129(a), and 105(a) of the Bankruptcy Code.

B. Rabkin's Vote Should Not be Considered Because the Rabkin Claim is an Insider Claim

As a threshold matter, Rabkin's vote should not be considered because the Rabkin Claim is an "insider" claim that was improperly designated as a Class 3 unsecured claim in order to create an "impaired" consenting class for purposes of cramdown. However, improper classification of claims for purpose of gerrymandering to create an impaired, consenting class is indicative of bad faith and

should not be permitted. *See, e.g., In re Hotel Associates of Tucson*, 165 B.R. 470 (B.A.P. 9th Cir. 1994) (remanding for a determination of the debtor's good faith, instructing the bankruptcy court to "recognize that the act of impairment in an attempt to gerrymander a voting class of creditors is indicative of bad faith.").

Section 1129(a)(10) of the Bankruptcy Code does not permit an insider to vote on a chapter 11 plan. Section 101(31) of the Bankruptcy Code defines an "insider" of a corporation as a (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor or (vi) relative of a general partner, director, officer or person in control of the debtor. Courts regularly treat this definition as illustrative of the types of possible insider relationships, rather than an exhaustive list. *Anstine v. Meditec (In re U.S. Med. Inc.)*, 531 F.3d 1272, 1276 (10th Cir. 2008). Managing members of limited liability companies have been held to be insiders for purposes of Section 101(31). *In re Longview Aluminum, L.L.C.*, 657 F.3d 507 (7th Cir. 2011); *see also Solomon v. Barman (In re Barman)*, 237 B.R. 342 (Bankr. E.D. Mich. 1999) (holding that a limited liability company that had filed a bankruptcy qualified as an insider of two Chapter 7 debtors (a husband and wife) who owned interests in the limited liability company).

As discussed more thoroughly below, courts have found that several types of relationships with the debtor can lead to the conclusion that such entities or individuals are insiders. These relationships have included, but are not

limited to, close personal friends of the debtor, a member in limited liability company owned in part by the debtor, a live-in girlfriend, and others.

1. Rabkin's Claim Maintains Its Characteristics as an Insider Claim

As a preliminary matter, the Insider Claim was originally held by MBP, which owns 100% of the membership interests of the Debtor, and is the Debtor's Managing Member. "As a general rule, 'an entity which acquires a claim steps into the shoes of that claimant, enjoying both the benefits and the limitations of the claim, as a successor in interest.'" *In re Holly Knoll P'ship*, 167 B.R. 381, 385 (Bankr. E.D. Pa.1994) (quoting *In re Applegate Property*, 133 B.R. at 833); *see also Enron Corp. v. Springfield Assoc., LLC (In re Enron Corp.)*, 379 B.R. 425, 435-36 (S.D.N.Y. 2007) ("[A]n assignee stands in the shoes of the assignor and [is] subject to all equities against the assignor. In other words 'an assignee of a claim takes with it whatever limitations it had in the hands of the assignor.'. . .").

As several courts have noted, "the operation of section 1129(a) would be seriously undermined [if the] Debtor[ ] [who is] unable to obtain the acceptance of an impaired creditor[,] simply could assign insider claims to third parties who in turn could vote to accept. This the court cannot permit." *Three Flint Hill Ltd. P'ship v. Prudential Ins. Co. (In re Three Flint Hill Ltd. P'ship)*, 213 B.R. 292, 299 (D. Md. 1997) (affirming denial of confirmation, noting that claimant's purchase of claim was not a

"carefully reasoned business decision," but instead an accommodation to a friend or business partner); *see also Matter of Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988) (noting that if the court were to deviate from the general rule of prohibiting purchasers of insider claims from voting their claims, "[d]ebtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties who in turn could vote to accept. This the court cannot permit.").

Accordingly, because MBP would not be entitled to vote the Insider Claim under Section 1129(a)(10), Rabkin should be precluded from voting the Insider Claim.

2. Rabkin is a Non-Statutory Insider

Alternatively, even if the Court concludes that the Insider Claim sold to Rabkin does not fall within the strict definition of an "insider" claim for purposes of Section 101(31) of the Bankruptcy Code, Rabkin should nevertheless be designated a "non-statutory insider" given his romantic involvement and very close friendship with Ms. Kathie Bartlett, and evidence that Rabkin's purchase of the Insider Claim was not an arms-length transaction. Section 101(31) provides that an "insider" in the case of a corporation "includes" directors, officers of the debtor, and several others. As discussed above, if creditors fall into one of the specifically enumerated categories, they constitute "statutory" insiders. However, by adding the word "includes," Congress did not intend the list of enumerated insiders to be exhaustive. *See In re U.S. Med. Inc.*, 531 F.3d at 1276 (*citing Rupp v. United*

Sec. Bank (In re Kunz), 489 F.3d 1072, 1078-79 (10th Cir. 2007)). Congress intended the list to be illustrative only and to include other insiders as well, who are commonly referred to as "nonstatutory insiders." *Id.* The legislative history provides that an "insider" is defined as "one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6269, 1977 WL 9628; S.Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N 5787, 5810. In determining whether a person is a non-statutory insider, courts generally focus on two basic factors: (1) the closeness of the relationship between the debtor and the transferee; and (2) whether the transaction between the transferee and the debtor was conducted at arm's length. *See In re U.S. Med. Inc.*, 531 F.3d at 1278; *Matter of Krehl*, 86 F.3d 737, 741-42 (7th Cir. 1996); *see also Shubert v. Lucent Techs., Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 396-97 (3d Cir. 2009) (rejecting argument that only a "person in control" could be an insider, and holding that "the question is whether there is a close relationship [between debtor and creditor] and ... anything other than closeness to suggest that any transactions were not conducted at arm's length.") (internal citations omitted).

Several courts have held that insider status can be based on a romantic relationship between a debtor and another individual. *See e.g., Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (finding in the context of a preferential transfer lawsuit that a woman with whom the debtor was romantically involved prior to the transfer

of stock was an insider even though they asserted they were not together at the time of the transfer); *Walsh v. Dutil (In re Demko)*, 264 B.R. 404, 408 (Bankr. W.D. Pa. 2001) (cohabitation by two people may render individual an insider, noting that "[t]he true test of 'insider' status is whether one's dealings with the debtor cannot accurately be characterized as arm's-length.'") (citations omitted); *Freund v. Heath (In re McIver)*, 177 B.R. 366 (Bankr. N.D. Fla. 1995) (holding in context of preferential transfer litigation that a live-in girlfriend may be an insider); *Castellani v. Kohne (In re Kucharek)*, 79 B.R. 393 (Bankr. E.D. Wis. 1987) (holding relationship between man and woman, although platonic, was one of such deep trust that man was deemed an insider).

Insider status can also be based on professional or business relationships with the debtor. *See, e.g., Friedman v. Sheila Plotsky Broker, Inc., (In re Friedman)*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991) (explaining that an insider relationship can exist that does not fit into statutory classifications, "where such relationship compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties."); *Hirsch v. Tarricone* (*In re A. Tarricone, Inc.*), 286 B.R. 256 (Bankr. S.D.N.Y. 2002) (holding that "golfing budd[y]" and close personal friend of the debtor's principal shareholder may be an insider). Based on the case law and the definition in the legislative history, an "insider" is one who does not deal at arm's length with the debtor, and can include parties who have a very close personal relationship including a romantic relationship.

In the instant case, Rabkin, should be designated as an insider. He testified that he had a romantic relationship with Ms. Bartlett, who is the designated representative of both the Debtor and MBP.[11] He also testified that he purchased the Insider Claim as a "business investment,"[12] and that other than getting paid the $30,000.00 provided for unsecured creditors under the Plan, he had "no other interest in the Village at Lakeridge."[13]

Rabkin also testified that he understood that the maximum amount that he would recover in the Debtor's bankruptcy was $30,000.00 in accordance with the terms of the Plan, and that he understood that there was a risk that he would get paid nothing at all if the Plan was not confirmed.[14] He refused to accept U.S. Bank's offer to purchase the Insider Claim for $50,000.00, without any conditions or ability to claw back those funds. See Exhibit "2" to the Owens Declaration.[15]

As discussed above, it is abundantly clear from Rabkin's testimony that this was not an arms-length

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11. *See* Exhibit "1" to the Owens Declaration; Rabkin Deposition, at p. 98:14-18.

12. *Id.* at p. 75:16-25,

13. *Id.* at p. 82:3-14.

14. *Id.* at p. 75:4-20.

15. Indeed, U.S. Bank offered to give Rabkin seven days to accept the $50,000.00 offer, or alternatively, to sell the claim to Rabkin for $60,000.00 on June 7, 2012. Rabkin said that he would "consider" both offers, and such offers have expired. *Id.* at p. 97:6-15.

transaction, and that Rabkin does not have a legitimate interest in reorganization. Indeed, Rabkin's testimony that he could not recall any of the material details of the assignment of the Rabkin Claim,[16] was not served with any of the bankruptcy pleadings (including the Notice of Assignment, Plan or Disclosure Statement),[17] and had not reviewed the Notice Assignment of Claim, the Plan, the Schedules, or any other documentation at any time prior to the Rabkin Deposition, is not credible and illustrates the illegitimate purpose of the assignment of the Insider Claim to Rabkin. Rabkin's lack of awareness regarding any material events in the Chapter 11 case, or the circumstances surrounding his own acquisition of the Insider Claim, is inconsistent with the behavior of an experienced investor as he claims to be.[18] Rabkin is a shill for the Debtor. He acquired the Insider Claim to help create an impaired, consenting class, and has no legitimate interest in the outcome of the reorganization. Rabkin's interest is in fulfilling his instruction from Ms. Bartlett. Because the point of Section 1129(a)(10) is to prevent the Bankruptcy Court from becoming a "dumping ground for two party disputes," an accepting impaired class "must have a genuine interest in the reorganization." *Life Ins. Co. v. Barakat (In re Barakat)*, 173 B.R. 672, 681 (Bankr. C.D. Cal. 1994) (inasmuch as former tenant owed security deposit is not a creditor with a "genuine interest in reorganization," his acceptance should not permit

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16. *See* Exhibit "1" to the Owens Declaration, Tr. of Robert Alan Rabkin, at pp. 47:25 to 51:3; 54:20 to 57:21.

17. *Id.* at pp. 65: 16-22; 66: 6-9; 73:7-10; 74:20-22.

18. *Id.* at pp. 61:4 to 62:14; 63:2-6; 65:16 to 73:10; and 76:2 to 79:22.

imposition of "cram down" reorganization on principal creditor); *see also In re Franklin Mortgage & Inv. Co., Inc.*, 143 B.R. 295, 300 n.1 (Bankr. D. Colo. 1992) (noting in case where the only unsecured creditor was an accounting firm owed $5,000.00, and the objecting secured creditor was owed $2,250,000.00, "to allow the accounting firm's claim to serve that purpose would be a true case of the tail wagging the dog"). In this case, notwithstanding his testimony to the contrary, Rabkin may have a personal interest in seeing the Debtor's Plan confirmed for Ms. Bartlett's sake. However, given his testimony and failure to accept an offer that would provide him with a minimum of an additional $20,000.00 more than his claim is worth (without any recourse by the Lender in the event the Plan is not confirmed or the claim is disallowed), he does not possess a legitimate business interest in the Debtor's reorganization. Accordingly, the Rabkin Claim must be designated as an insider claim and disallowed for voting purposes.

CONCLUSION

For the foregoing reasons, Lender requests that the Court (A) designate the Rabkin Claim as an "insider claim," and (B) disallow the Rabkin Claim for voting purposes. Lender requests all other relief that the Court deems just and proper.

Dated: June 29, 2012 VENABLE LLP

By: /s/_____
Keith C. Owens
Attorneys for Movant

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In Re:

THE VILLAGE AT LAKERIDGE, LLC,
a Nevada limited liability company,

Debtor.

Hearing Date: July 19, 2012
Hearing Time: 2:00 p.m.

OPPOSITION TO U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. §§ 1126(E), 1129(A), AND 105(A)

Debtor, THE VILLAGE AT LAKERIDGE, LLC, by and through its counsel, Alan R. Smith, Esq., of the Law Offices of Alan R. Smith, hereby opposes U.S. Bank's Motion To (A) Designate Claim of Robert Rabkin As An Insider Claim Or (B) Disallow Such Claim For Voting Purposes Pursuant To 11 U.S.C. §§ 1126(e), 1129(a), and 105(a) [DE194] ("Motion"). This opposition is based upon the following points and authorities, the Declaration of Robert Rabkin in support hereof, the pleadings and papers on file herein, and such other matters as may appear at any oral hearing thereon.

POINTS AND AUTHORITIES

1. In November of 2012, Dr. Robert Rabkin ("Dr. Rabkin") acquired the claim of MBP Equity Partners I, LLC. The claim is an unsecured claim in the amount of $2,761,000.00 against the Debtor, which Dr. Rabkin acquired for the sum of $5,000.00.

See Declaration of Robert Rabkin.

2. A Notice of Assignment of Claim [DE 78] (the "Notice") was filed with the Court on November 4, 2011. The assignment of claim (the "Assignment") is attached to the Notice. The Assignment clearly states that it is for future distributions if any. *Id.*

3. On June 7, 2012, Robert Rabkin presented himself for a deposition in this matter and was deposed by Keith Owens, an attorney for the lender, U.S. Bank. Dr. Rabkin was asked questions regarding the purchase of his claim.

4. Much to Dr. Rabkin's surprise, toward the end of his deposition, Keith Owens made an offer to purchase Dr. Rabkin's claim for $50,000.00 cash in the form of a cashier's check. *Id.; See Dr. Rabkin Deposition Transcript attached to the Motion as* ***Exhibit "1-3"***. At the onset of negotiations Dr. Rabkin informed Keith Owens that he was not prepared to negotiate at his deposition, and that it was Dr. Rabkin's understanding that he was there to be asked questions regarding what he knows and what he has done. *Id.* at p.86.

5. Keith Owens badgered Dr. Rabkin for some time imploring Dr. Rabkin to accept U.S. Bank's offer. *See Declaration of Robert Rabkin; See also, Dr. Rabkin Deposition Transcript pp. 83-100 attached to the Motion as* ***Exhibit "3"***. Dr. Rabkin informed Keith Owens numerous times that he would consider the offer. *Id.* As stated in his deposition, Dr. Rabkin is not an impulsive person, and he generally takes time to think about these type of things. *See generally Dr. Rabkin Deposition Transcript pp. 42-43.*

6. Next, to escalate the pressure even more, Keith Owens increased the cash offer to purchase Dr. Rabkin's claim from $50,000.00 to $60,000.00. *Id.* Keith Owens informed Dr. Rabkin that he would have to accept his offer for $60,000.00 that same day, or the offer was gone. Dr. Rabkin was amazed that Keith Owens would engage in negotiations during the course of Dr. Rabkin's deposition. *Dr. Rabkin Deposition Transcript p. 87.* Dr. Rabkin was and is insulted by what he believed to be overreaching and browbeating by U.S. Bank and Keith Owens. *Declaration of Robert Rabkin.*

7. Upon further discussion with his counsel, and after a period of time, Dr. Rabkin has concluded that he is unwilling to sell his claim to U.S. Bank.

8. Because Robert Rabkin did not give in to the harassing offer to purchase his claim, U.S. Bank has now filed its Motion To (A) Designate Claim of Robert Rabkin As An Insider Claim Or (B) Disallow Such Claim For Voting Purposes Pursuant To 11 U.S.C. §§ 1126(e), 1129(a),

and 105(a) as a last ditch effort to block confirmation of the Debtor's proposed plan of reorganization.

A. Robert Rabkin's Claim Should Not Be Designated

"A right to vote on a plan is a fundamental right of creditors under Chapter 11." *In re Adelphia Commc'ns Corp.*, 359 B.R. 54, 61 (Bankr. S.D. N.Y. 2006). Designation of a vote is a drastic remedy and a party seeking it has a high burden of proof. *See In re DBSD N. Am., Inc.*, 634 F.3d 79, 101-102 (2nd Cir 2011). ("Bankruptcy courts should employ § 1126(e) sparingly, as 'the exception, not the rule.'); *See Adelphia*, 359 B.R. at 61 ("Designation of a creditor's vote is a drastic remedy...."). Bankruptcy Code § 1126(e) is "intended to apply to those who were not attempting to protect their own property interests, but who were, instead, attempting to obtain some benefit to which they were not entitled." *In re Fighter*, 118 F.3d at 639; *See In re Gilbert*, 104 B.R. 206, 216 (Bankr. W.D. Mo. 1989) (the standard is whether "creditor has cast his vote with an 'ulterior purpose' aimed at gaining some advantage to which he would not otherwise be entitled in his position.") A selfish motive is insufficient to establish that a vote was not cast in good faith. *In re Fighter*, 118 F.3d at 639. Creditors are not "expected to approach reorganization plan votes with a high degree of altruism and with the desire to help the debtor and their fellow creditors." *Id.*

A decision as to whether someone acted in bad faith is essentially a factual inquiry and is driven by the data of

practical human experience. *In re Fighter Ltd.*, 118 F.3d 635, 638 (9th Cir. 1997) citing *United States v. McConney*, 728 F.2d 1195, 1203-04 (9th Cir. 1984). The court in *In re Fighter* reasoned that "[p]rior cases can offer guidance, but, when all is said and done, the bankruptcy court must simply approach each good faith determination with a perspicacity derived from the data of its informed practical experience in dealing with bankrupts and their creditors." *Id.* at 639.

U.S. Bank asserts in its Motion that "the Rabkin claim should be disallowed for voting purposes on the ground that his vote would not be consistent with his self interest as a creditor and constitutes bad faith." Motion p. 8, l. 14-15. As stated in his deposition testimony, Dr. Rabkin purchased the claim as a business decision. Q: "Why did you purchase the claim from MBP Equity Partners?" A: "It was an investment." Q: "So it was a business investment?" A: "Correct." *Deposition Transcript of Robert Rabkin p. 78.*

U.S. Bank goes on to argue its "conspiracy theory" by stating that the Debtor and MBP Equity Partners have attempted to manipulate the plan confirmation process by selling the MBP insider claim to Dr. Rabkin in an attempt to artificially create an impaired consenting class for purposes of confirming the Debtor's plan of reorganization. At the Deposition of Kathie Bartlett, she stated that MBP Equity Partners sold its claim to Robert Rabkin because it was valueless to MBP, it wasn't worth anything to it, and MBP thought it might be worth something to somebody else. *See Deposition Transcript*

of Kathie Bartlett attached hereto as ***Exhibit "A"*** *p. 59.* In fact, Kathie Bartlett approached Dr. Rabkin, a friend, with a potential investment offer. *Id.* at 57. She knew he was invested in several different kinds of things. *Id.* Ms. Bartlett stated that the terms of the sale were that she offered to sell the claim to Dr. Rabkin, and he agreed to buy it. Q: "He paid $5,000, took the claim, and whatever treatment he gets in the bankruptcy case, he gets?" A: "Yes." *Id.*

At the deposition of Robert Rabkin he was asked a similar line of questioning: Q: "What is your general recollection as to what [Kathie Bartlett] said during that first discussion about the claim?" A: "My recollection, all I can recall is that she said that there was a claim and it was going to be sold and she indicated that I could buy it." *Deposition of Robert Rabkin p.37.* Q: "What did Kathie Bartlett tell you you needed to do to acquire the claim from MBP Equity Partners" A: "Pay, $5,000." *Id.* at 65. Q: "Did Ms. Bartlett tell you at any time that you will get paid on your claim in the Village at Lakeridge bankruptcy?..." A: "How could she tell me I was going to get paid? I don't understand how she would have been able to tell me that... the answer is no."

Accordingly, there has been no manipulation of the plan process. There was a claim that was valueless to MBP Equity Partners that it wanted to sell. Robert Rabkin happened to be the person who purchased the claim. The claim was purchased as an investment/business opportunity. As stated below, there were no other terms of the transaction, and there was no promise from Dr. Rabkin to vote in favor of the plan.

Q: "Now are there any other terms of the transaction that aren't discussed in the Assignment of Creditor's claim?" A: "No, I don't understand what you mean about terms. We agreed to sell the claim... and he agreed to buy it." *Deposition of Kathie Bartlett* at 59. Q: "Has MBP, or anyone else for that matter, made any other agreements or understandings with Mr. Rabkin regarding the claim, other than as reflected in the assignment?" A: "No." *Id.* When Robert Rabkin was asked: "Were you asked to vote in favor of the plan of reorganization." He answered: "No." Q: "In connection with your purchase of the claim?" A: "No."

U.S. Bank argues that because Dr. Rabkin has a relationship with Kathie Bartlett, and because he did not accept U.S. Bank's crude offer to purchase his claim those facts "reveal" that the claim was assigned in bad faith. Dr. Rabkin should not be crucified for having a relationship with Kathie Bartlett. Dr. Rabkin is an intelligent man (an ex-surgon), with his own mind, and his own money. Further, Kathie Bartlett is the only one of MBP Equity Partners' five managing members that Dr. Rabkin knows. There is no impropriety here, and no real evidence to show this was anything but an arms-length transaction. Further, I doubt this Court would find it hard to believe that after being badgered, Dr. Rabkin turned down U.S. Bank's inappropriate offer to purchase his claim.

B. Robert Rabkin's Claim Is Not An Insider Claim Simply Because He Purchased The Claim Of An Insider

The court in *In re Concord Square Apts. of Wood County, Ltd.*, 174 B.R. 71, (Bankr. S.D. Ohio 1994) held that "the 'insider' status of a claimant does not, as a matter of law, transfer with a claim upon the sale or assignment of that claim to a third party. Such status does not transfer as a matter of law for two reasons. First, in bankruptcy, a distinction is made between the status of a claim and the status of a claim holder. That distinction precludes 'insider' status from tainting the status of a claim. Second, the status of a third party transferee as an 'insider' is a question of fact to be determined after any transfer takes place." *Id.* "In the context of §1129(a)(10), the determination of insider status is made at the time the vote is taken, not at the time the claim arises." *In re Mcorp Financial, Inc.*, 137 B.R. 219, 232 (Bankr. S.D. Tex 1992). Contrary to U.S. Bank's assertion, a once insider claim may lose its insider status if the transferee is not determined to be an insider his or herself. *See Id.* The question then, is whether Dr.Rabkin is an insider.

C. Robert Rabkin Is Neither An Insider Under 11 U.S.C. §§ 1129(a) and 101(31), Nor A Non-Statutory Insider

An insider pursuant to §101(31) includes an affiliate of the debtor. Whether an entity is an insider is a question of fact that must be determined on a case by case basis. *In re Mcorp Financial, Inc.*, 137 B.R. at 232. The true

test of an insider is one who has such a relationship with the debtor that their dealing with one another cannot be characterized as arms-length transactions. *Id.; In re Bella Vista by Paramont, LLC,* 2011 WL 3303258, at *5 (9th Cir. B.A.P. Mar. 11, 2011). The controlling considerations are the closeness of the parties and the relative degree of control each has over the other. *Id.* "[N]ot every creditor-debtor relationship attended by a degree of personal interaction between the parties rises to the level of an insider relationship." *See In re Friedman,* 126 B.R. 63, 70 (9th Cir B.A.P. 1991). It is unlikely that Congress intended that relationships that have existed over a period of time, attended by some personal involvement but ***without control by the creditor over the debtor's business,*** would subject such creditor to insider status. *See generally, Id. (emphasis added); See also, Entr. Acquisition,* 319 B.R. at 633 (noting that the test for non-statutory insiders "requires some showing of control of the debtor.") The Court in *In re Mcorp Financial, Inc.,* 137 B.R. at 232, held that although the purchaser of an insider claim had a bias, that did not rise to the level necessary for the court to find that it was an insider.

To be sure, cases within the Ninth Circuit have used the word "affinity" when describing suspect transactions. *See In re Bella Vista by Paramount, LLC,* 2011 WL 3303258, at *5 (9th Cir B.A.P. Mar. 11, 2011). The Court in *In re Friedman,* 126 B.R. at 69-70, appears to have borrowed the word "affinity" from Bankruptcy Code § 101(39), which defines "relatives." Affinity is regarded as the connection existing in consequence of marriage between each of the married persons and the kindred of

the other." *In re Winn*, 127 B.R. 697, 699 (Bankr. N.C. Fla. 1991). In this context, there must be a relationship that shows much more than a "liking" for the debtor - it must be more like a marital relationship. *In re Reinbold*, 182 B.R. 244 (D.S.D. 1995).

Robert Rabkin and Kathie Bartlett are friends. *See Robert Rabkin Deposition Transcript; See also, Kathie Bartlett Deposition Transcript, p. 56.* They do have a relationship, but it does not rise to the level of "affinity." Robert Rabkin and Kathie Bartlett met when Kathie Bartlett was showing him potential homes to purchase, she was acting as his real estate agent at the time. *Id.* Their friendship has grown from there.

As expressed in both Dr. Rabkin's and Ms. Bartlett's depositions, Robert Rabkin does not know any other member, or any other managing member of MBP Equity Partners. *Robert Rabkin Deposition Transcript, p. 40; Kathie Bartlett Deposition Transcript, p. 56.* Accordingly, Dr. Rabkin has no control over the Debtor. After all, how could he. U.S. Bank has not met its burden of proof that Robert Rabkin even has control over Kathie Bartlett, much less the other members of MBP Equity Partners. Kathie Bartlett is just one of five managing members of MBP Equity Partners, and those managing members answer to all of the other members.

U.S. Bank tries to make much over the fact that Dr. Rabkin did not engage in significant due diligence before purchasing the claim. Dr. Rabkin is financially secure and $5,000.00 is not a very big investment for him.

See Declaration of Robert Rabkin; See Robert Rabkin Deposition Transcript. Further, Robert was aware of the building, as he lives in the area, and he did conduct a cite visit. *Robert Rabkin Deposition Transcript*, p. 29. At his deposition Dr. Rabkin stated that he was sure that he had asked Kathie Bartlett some questions regarding the claim, but he could not remember at the time of the deposition the specifics of the questions that he had asked. *Id.* at 64.

Dr. Rabkin purchased this claim as a business investment, U.S. Bank has provided no evidence, other than Robert's refusal to accept U.S. Bank's offer to purchase Dr. Rabkin's claim, that this was anything but an arms-length transaction. Dr. Rabkin was insulted and offended by U.S. Bank's badgering offer to purchase his claim during the course of his deposition. He felt "browbeaten" by U.S. Bank's over reaching actions. *See Declaration of Robert Rabkin.* Dr. Rabkin's refusal to sell his claim to U.S. Bank shows nothing more than a distaste for U.S. Bank and its counsel. Dr. Rabkin is 67 years old, is an ex-surgeon and is financially secure. *Id.* Dr. Rabkin is certain that he is not under any obligation to sell his claim to U.S. Bank, regardless of whatever offer it makes. *Id.* Dr. Rabkin is hopeful that the local business which is owned by local people will be able to reorganize. There is nothing inappropriate about that.

CONCLUSION

For the foregoing reasons, the Debtor requests that this Court refuse to designate the vote of Robert Rabkin, and that this Court allow Robert Rabkin to vote on the Debtor's plan of reorganization.

DATED this 13th day of July, 2012.

LAW OFFICES OF ALAN R. SMITH
By: */s/ Alan R. Smith*
ALAN R. SMITH, ESQ.
Attorney for Debtor

[EXHIBIT A INTENTIONALLY OMITTED]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. BK-N-11-51994-BTB

Chapter 11

In Re:

THE VILLAGE AT LAKERIDGE, LLC,
A NEVADA LIMITED LIABILITY COMPANY,

Debtor.

CERTIFICATE OF ACCEPTANCE AND REJECTION OF CHAPTER 11 PLAN [BALLOT SUMMARY]

Hearing Date: August 1, 2012
Hearing Time: 10:00 a.m.

Debtor, THE VILLAGE AT LAKERIDGE, LLC, a Nevada limited liability company, by and through its counsel, Alan R. Smith, Esq., of the Law Offices of Alan R. Smith, hereby files its certificate that ballots concerning the Debtor's Plan of Reorganization **(Dkt. #48)** as amended by the Debtor's Second Amendment To Debtor's Plan Of Reorganization **(Dkt. #109)**, have been received as follows:

Creditor	Class	Amount	Vote
U.S. Bank	1	$21,860,052.37	Rejects

TOTAL CREDITORS VOTING:	1
PERCENTAGE IN NUMBER ACCEPTING:	0%
PERCENTAGE IN DOLLAR AMOUNT ACCEPTING:	0%

Robert A. Rabkin	3	$ 2,761,000.00	Accepts

TOTAL CREDITORS VOTING:	1
PERCENTAGE IN NUMBER ACCEPTING:	100%
PERCENT AGE IN DOLLAR AMOUNT ACCEPTING:	100%

The Debtor is unaware of any other ballots.

Copies of the Ballots are collectively attached hereto as **Exhibit "A."** The original ballots are in the possession of Debtor's counsel, and are available for inspection and review by the Court and any interested party.

DATED this 30th day of July, 2012.

LAW OFFICES OF ALAN R. SMITH

By: */s/ Alan R. Smith*
ALAN R. SMITH, ESQ.
Attorney for Debtor

EXHIBIT "A"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. BK-N-11-51994-BTB
Chapter 11

In Re:

THE VILLAGE AT LAKERIDGE, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Debtor.

BALLOT FOR ACCEPTING OR REJECTING DEBTOR'S PLAN OF REORGANIZATION

Hearing Date: August 1, 2012
Hearing Time: 10:00 a.m.

The Plan of Reorganization referred to in this ballot can be confirmed by the Court only if two-thirds in amount and more than one-half in number of creditors in each class of interest voting on the Plan accept the Plan, or, in the event of a rejection, the Court finds that the Plan nonetheless conforms to the requirements of the law. See 11 U.S.C. § 1129.

This ballot must be returned by mail, fax or email no later than **5:00 p.m. July 27, 2012**, to:

Alan R. Smith, Esq.
Law Offices of Alan R. Smith
505 Ridge Street
Reno, Nevada 89501
Facsimile Number: (775) 786-3066;
email: mail@asmithlaw.com

The undersigned acknowledges receipt of the Plan of Reorganization and votes as follows:

		[Check One Box]
Class of Creditor:	Secured	Accepts (___)
Amount of Claim:	$ 21,860,052.37	Rejects (XX)
Name of Creditor:	U.S. Bank National Association as Trustee as successor-in-internal to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3, by and through, CWCapital Asset Management LLC, solely in its capacity as Special Servicer, c/o CWCapital Asset Management, 7501 Wisconsin Avenue, Suite 500W, Bethesda, MD 20814	
Address:		

By: Benjamin C. Miller

Title: Vice President, CWCapital Asset Management, LLC
Solely in its capacity as Special servicer to the Trust

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. BK-N-11-51994-BTB
Chapter 11

In Re:

THE VILLAGE AT LAKERIDGE, LLC,
A NEVADA LIMITED LIABILITY COMPANY,

Debtor.

BALLOT FOR ACCEPTING OR REJECTING DEBTOR'S PLAN OF REORGANIZATION

Hearing Date: August 1, 2012
Hearing Time: 10:00 a.m.

The Plan of Reorganization referred to in this ballot can be confirmed by the Court only if two-thirds in amount and more than one-half in number of creditors in each class of interest voting on the Plan accept the Plan, or, in the event of a rejection, the Court finds that the Plan nonetheless conforms to the requirements of the law. See 11 U.S.C. § 1129.

This ballot must be returned by mail, fax or email no later than **5:00 p.m. July 27, 2012**, to:

Alan R. Smith, Esq.
Law Offices of Alan R. Smith
505 Ridge Street
Reno, Nevada 89501
Facsimile Number: (775) 786-3066;
email: mail@asmithlaw.com

The undersigned acknowledges receipt of the Plan of Reorganization and votes as follows:

		[Check One Box]
Class of Creditor:	Unsecured	Accepts (✓)
Amount of Claim:	$ 2,761,000	Rejects ( )
Name of Creditor:	Robert A. Rabkin	
Address:	4790 Caughlin Pkwy #375	
By:	Reno, NV, 89519	
Title:	Robert A. Rabkin	

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

11-51994-btb

In re:
THE VILLAGE AT LAKERIDGE, LLC CH: 11

DOC# 194 APPLICATION U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS AN INSIDER CLAIM OR (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES PURSUANT TO 11 U.S.C. 1126(E), 1129(A) AND 105(A) FILED BY LOUIS M. BUBALA III ON BEHALF OF U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION

11-51994-btb

In re:
THE VILLAGE AT LAKERIDGE, LLC CH: 11

DOC# 169 SECOND APPLICATION FOR COMPENSATION TO COLLIERS INTERNATIONAL FOR THE VILLAGE AT LAKERIDGE, LLC, FEES: 3,215.70, EXPENSES: 0.00. FILED BY ALAN R SMITH

11-51994-btb

In re:
THE VILLAGE AT LAKERIDGE, LLC CH: 11

DOC# 26 MOTION FOR RELIEF FROM STAY PROPERTY: VILLAGE AT LAKERIDGE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO FORECLOSE ON DEBTOR'S PROPERTY FEE AMOUNT $150, WITH CERTIFICATE OF SERVICE FILED BY JANET L. CHUBB ON BEHALF OF U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION

11-51994-btb

In re:
THE VILLAGE AT LAKERIDGE, LLC CH: 11

DOC# 86 AMENDED OBJECTION TO CLAIM 1 OF U.S. BANK AS SUCCESSOR TO GREENWICH CAPITAL IN THE AMOUNT OF 22,124,173.37 FILED BY ALAN R SMITH ON BEHALF OF THE VILLAGE AT LAKERIDGE, LLC

U.S. Bankruptcy Court
300 Booth Street
Reno, Nevada 89509-1300

August 1, 2012
10:15 a.m.

BEFORE THE HONORABLE
BRUCE T. BEESLEY, Judge

* * *

[9]ROBERT ALAN RABKIN, WITNESS, SWORN

THE COURT: And could you please step up here and take the witness stand.

DIRECT EXAMINATION

BY MR. SMITH:

Q Will you state your name for the record please?

A Robert Alan Rabkin.

Q And Mr. Rabkin, what is your professional --

THE COURT: Dr. Rabkin.

BY MR. SMITH:

Q Dr. Rabkin, what is your professional background? I apologize.

A I'm a --

THE COURT: We're big on titles here.

THE WITNESS: I'm a surgeon.

[10]BY MR. SMITH:

Q How long were you a surgeon?

A I was in private practice from 1977 until I retired in 2007. 30 years.

Q And what type of surgeon were you?

A I did -- for the last half of my career, I was specializing in laparoscopic surgery and bariatric surgery.

Q Okay. And you're currently retired?

A Yes.

Q Do you know Kathy Bartlett?

A Yes, I do.

Q Okay. And what are the -- well how do you know Kathy Bartlett?

A Well, I met --

THE COURT: Please refer to her as Ms. Bartlett.

BY MR. SMITH:

Q Ms. Bartlett. How do you know Ms. Bartlett?

A I met her in the process when I was looking for a home here in Reno.

Q And approximately when was that?

A It was about two years ago.

Q Okay. And since that time what has your relationship been with Ms. Bartlett?

A We're friends.

Q Okay. Anything more than friends? Do you socialize?

[11]A We socialize, yes.

Q Okay. Do you occasionally have dinner together?

A Yes.

Q Okay. Did there come a time when you were approached by Ms. Bartlett about potentially purchasing a claim against this Debtor, Village at Lakeridge?

A Yes.

Q Do you recall when that was?

A I believe it was last fall.

Q Okay. And what was your initial response when you were approached?

A Well, I wasn't sure -- I had to think about it.

Q Okay. And did you think about it?

A Yes, I did.

Q Did you have any subsequent meetings with Ms. Bartlett about the purchase of the claim?

A There were no meetings that were specific for that purpose. I think that we probably discussed it briefly several times.

Q Over the course of what period of time?

A Probably a month or two. Maybe more.

Q Okay. Had you ever done such a thing before, purchased a claim in a bankruptcy case?

A No.

Q Okay. And during this period of time, did you conduct any [12]investigation concerning this Debtor, the Village at Lakeridge? When I say Debtor, do you know what I mean? Debtor is a term that we use in bankruptcy and in this case it means the Village at Lakeridge which is the entity that you have the claim against. So did you do any investigation of the Debtor in this case prior to purchasing

the claim?

A I think the answer is no. I don't -- the Debtor being the entity that owns the property --

Q Okay.

A -- is that what you mean?

Q Correct.

A I may have seen -- well I walked through the property if that's what you mean.

Q Okay. Prior to purchasing the claim?

A Yes.

Q Is there anything else that you looked at prior to purchasing the claim?

A It's possible that I at one point saw a rent roll. I don't have any recollection of what was in it. And I certainly didn't -- never received a copy.

Q Do you know what the claim amount is that you purchased?

A 2.761 million.

Q Okay. And how much did you pay for the purchase of that claim?

A $5,000.

[13]Q Now --

THE COURT: So it was a bit speculative?

THE WITNESS: I'm sorry.

THE COURT: Some speculation going on there?

THE WITNESS: Yes. Yes, Your Honor.

BY MR. SMITH:

Q How did you arrive at that price of $5,000, Dr. Rabkin?

A I don't believe that it was -- the number I believe was mentioned to me that the claim was going to be sold for that amount of money.

Q Okay. And you said that the only investigation you did was walk the property and maybe look at a rent roll. Is there a reason why you didn't conduct any further investigation prior to making this purchase?

A Well, I think this was too -- this was very speculative. I didn't want to invest -- in order to get -- I think in all honesty due diligence would have been very expensive. And I thought that there seemed to be a possibility that I would get a reasonable return on my investment. But putting a lot of money into it just didn't make sense.

Q Did you understand that there's a possibility you would get no return on your investment?

A Certainly.

Q Now at the time and in connection with your conversations with Ms. Bartlett, were you ever asked to vote in favor of the [14]Debtor's plan?

A No.

Q Do you know what I'm talking about when I say the Debtor's plan?

A I do now. I didn't then.

Q Okay. Did you look at the Debtor's plan prior to your purchase of the claim?

A No.

Q Okay. Were you ever told that your vote on the plan might be necessary to get the plan confirmed?

A Not until recently.

Q Okay. And recently meaning when?

A Well, I had my deposition and I think in the process of understanding what the deposition was about.

Q Were you ever promised that you would by anyone, Kathy Bartlett or anyone else, that you would get your money back? Your $5,000?

A No.

Q And was it actually your money that you used to purchase the claim?

A Yes.

Q Okay. In other words, you didn't borrow it from Kathy Bartlett or I'm sorry Ms. Bartlett or anyone else?

A No.

Q Okay. And do you have any side agreement with anyone [15]including Ms. Bartlett concerning this claim?

A No.

Q In other words, that you get maybe something else or some other advantage other than just your rights as a claim holder?

A I do not.

Q Okay. And at this point, do you expect a return on your investment?

A I don't know how to answer that. It seems like there's -- the more I know about it, the more questions I have.

Q Okay.

A Do I expect a return? I'm hoping for a return.

Q And what are the questions you have now that you know more about it?

A The process. The whole process is much more involved than I appreciated.

Q Okay. And as a result of that, have you hired an attorney?

A Yes.

Q And you hired Mr. Hartman, correct?

A Correct.

Q Now I just want to ask you a couple other questions about your relationship with Ms. Bartlett. Not in any great detail but is your relationship with Ms. Bartlett such that if she asked you to do something such as vote in favor of the plan, would you just do it?

[16]A No, absolutely not.

Q Is that with regard to investments, I mean are you – do you make your own decision in that regard?

A We have no --

Q No, no, you personally I'm talking about.

A Do I make my own decisions?

Q Yes.

A Yes.

Q Okay. And you've made other than purchasing claims, have you made other investments in your lifetime?

A I have.

Q Okay. After you purchased the claim, and I'm not sure. Let's go back and do you know what date that purchase was consummated? I mean we can look at the documents but if you recall.

A I believe it was at the end of October.

Q Okay. After the time that you purchased the claim -- by the way, were there any representations by Ms. Bartlett that the decision to sell the claim had to be made by others other than her personally?

A No.

Q But did you believe that she had the decision making power to sell the claim or not?

A No.

Q Okay. Were you ever advised that there were other members [17]of the group that had to participate in the decision making process?

A I understand that that's the case.

Q Okay.

THE COURT: I'm sorry. I didn't follow this. You understand that's the case now. Did you understand it at the time you purchased the claim?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

BY MR. SMITH:

Q So your answer is both or now? Both?

A The question is did I understand that there was a group --

Q Correct.

A -- involved? Yes, I did.

Q Okay.

A Sorry.

Q Now since you purchased the claim, have you had any further discussions with Ms. Bartlett concerning the claim and just any aspect related thereto like the bankruptcy?

A Yes.

Q Okay. And when did those discussions occur?

A We've had discussions -- I had a deposition in the beginning of June.

Q Okay.

A And she is aware that I had the deposition. If that's [18] what you mean.

Q Well, I was more asking about whether there were discussions about how you would be treated under the plan or whether you would vote in favor of the plan. Did that issue come up in discussions with Ms. Bartlett?

A How I would be treated under the plan?

Q Correct.

A Yes, after the deposition, yes.

Q Okay. So that's something that's more recently that has occurred?

A Yes.

Q Approximately when did those discussions begin about what your treatment would be under the plan?

A It was last week.

Q Okay. Between the time of purchasing the plan and last week, did you have any discussions about how you would be treated under the plan with Ms. Bartlett?

A No.

Q Okay. Why did that come up last week?

A What happened at my deposition is that the attorney who was deposing me offered to buy my claim. Buy the claim that I own. And for a substantial amount of money.

Q How much?

A And -- well it was structured as $50,000 and then if I were to agree on the spot, the total would have been $60,000.

[19]Okay. And how did that sponsor conversations with Ms. Bartlett?

A Well, I did not -- we did not discuss that because I felt that it was not -- not allowed under the rules. And I think that it's been important to just not have any conversations. However, my understanding last week is that and I'm not an attorney obviously, but that there is a common interest

or community interest or something of that sort which at least in the presence of counsel, that type of we could discuss those issues. We've not had extensive discussions, however.

THE COURT: You have or you have not?

THE WITNESS: We've not.

THE COURT: Thank you.

BY MR. SMITH:

Q Now are you talking about discussions that occurred after you employed Mr. Hartman as your attorney?

A Yes.

Q And without getting into the substance of those, was one of your concerns about your treatment under the plan?

A Yes.

Q And what is your concern?

A Well, I didn't really expect to be investing a lot of money in this. And I thought that my outlay would be somewhere on the order of 5,000 give or take. And it looks like there are going to be a lot more expenses. So I felt that -- and that was [20]one factor. It was going to cost more for me to be involved and secondly, if the attorneys for the bank were willing to purchase it for $60,000, I would have thought that the minimum value is worth at least that.

Q Now you -- the offer to purchase your claim occurred during your deposition, as you said?

A That's correct.

Q And how did you respond in your deposition?

A I responded by saying that I would consider it.

Q Okay. Did you have any personal reaction to, you know, the way it was put to you at the deposition?

A I was appalled really. I just -- I thought that the entire situation was asymmetric. I was under oath, the deposition and I was being put on the spot. In fact, it seemed to me that after a couple hours of asking the same question over and over again, the other attorney came with -- put a check in my hand and said here, take this and I won't bother you anymore. And if you don't take it, I'm going to keep bothering you.

THE COURT: He actually said that?

THE WITNESS: No, Your Honor, but the implication was that -- yes, he did. Well, he said it in more or less he said you just take this money, you're done and if you don't take it, then there's a likelihood that you won't get anything. And that we're going to keep -- and then he continued to badger me.

[21]THE COURT: On behalf of the legal profession, I apologize. That's inappropriate.

THE WITNESS: Thank you, Your Honor.

MR. OWENS: Excuse me, Your Honor, I know we'll have an opportunity to respond to this, but if you read the transcript, that's not exactly -- that's not what happened at all. But the Court can have an opportunity --

THE COURT: You'll have a chance.

MR. OWENS: Thank you.

THE COURT: Were you the person questioning?

MR. OWENS: I was and so I --

THE COURT: Well, I did read the transcript and I thought your conduct was appalling as well. So don't be doing that again in a case in front of me. That's enough.

MR. OWENS: If Mr. Rabkin's offended, I do apologize to Mr. Rabkin.

THE COURT: Dr. Rabkin.

MR. OWENS: Dr. Rabkin.

THE WITNESS: Thank you.

MR. OWENS: But I will tell you under the Ninth Circuit authority it's appropriate for lenders to purchase claims and I didn't think there was anything --

THE COURT: Yeah, but not during the course of a deposition where you have somebody under oath. I think your conduct was bad. I don't know that it's sanctionable but I [22]thought it was offensive. And I did read the depo. Go ahead, Mr. Smith.

BY MR. SMITH:

Q And Dr. Rabkin, ultimately how have you responded -- have you made a final response to the bank's offer to purchase your claim for 60,000 -- well it was 50 and then 60?

A I did not respond within the time limit. So my expectation is that that -- I allowed that to expire.

Q Okay. Now backing up again to your relationship to Ms. Bartlett, do you and Ms. Bartlett, do you share any bank accounts?

A No.

Q Okay. Do you share -- do you live together?

A No.

Q Do you share any expenses or anything like that?

A No.

Q Do you loan each other money?

A No.

Q Okay. Do you know any of the member -- well, first of all, do you know -- I'm going to ask you some questions about MBPEP-1. I'll probably just shorten it to say MBP. So you know what I mean when I say MBP?

A Yes.

Q Okay. And that's the entity that the claim was purchased from?

[23]A Yes.

Q Do you know any of the members of MBP?

A No.

Q Have you ever met them?

A I met them on one occasion which I believe was -- well, I don't know exactly when it was, but it was in your office.

Q Was that the only occasion that you met the members of the MBP?

A Yes, that was the only occasion and there were only a couple present.

Q Okay. Have you had any prior relationship whatsoever with any of the members of MBP?

A No, I have not.

Q Okay. In your own words, just explain in your own words why you purchased this claim?

A Well, it seemed like there was -- the face value was really high. It seemed like there was an opportunity to have a return on my investment basically.

MR. SMITH: Okay. Your Honor, that's all I have on direct. Thank you.

THE COURT: Okay, cross.

MR. WHITWELL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. WHITWELL:

Q Good morning, Dr. Rabkin.

[24]A Good morning.

Q Dr. Rabkin, I just want to follow up on a couple of things that you testified to already. At the time that you purchased the claim, you had not looked at anything -- any documents of any kind in connection with that claim other than possibly a rent roll and you had -- that was the only document, possibly a rent roll, is that correct?

A Yes, I'm saying that, yes. The timing is -- it was somewhere around that time.

Q And you didn't receive a copy of that rent roll, correct?

A No, I did not.

Q And you also walked the property, correct?

A I walked in the property and walked around, yes.

Q Other than that, is the only information that you had with respect to the investment the information you got in your conversations with Kathy Bartlett?

THE COURT: Please refer to her as Ms. Bartlett.

MR. WHITWELL: Thank you, Your Honor, I will.

THE WITNESS: I'm sorry. The only information?

BY MR. WHITWELL:

Q In terms of the claim that you were purchasing --

A Yes.

Q -- the only information that you had prior to purchasing the claim was information you had obtained from your conversations with Ms. Bartlett, the possibly reviewing the [25]rent roll and physically looking at the property, is that correct?

A At that time.

Q At the time you purchased.

A Yes, at that time, yes.

Q Okay. And Ms. Bartlett did not give you any information regarding either your potential -- your likely or potential recovery on the claim, correct?

A Correct.

Q So you made an investment and it was for investment purposes meaning to hopefully make a profit on your investment, correct?

A Yes.

Q And you made that investment without any information whatsoever regarding either the potential or the likely return on that investment, is that fair?

A I told you the information that I have. I guess the answer is yes.

Q And is it your investment practice normally to make investments without having any information regarding either the likely or even potential return on that investment?

A Well, sometimes I make an investment based on a recommendation. Sometimes a broker would call me in the past. I don't do that anymore. But --

Q And when you've done that in the past, was the broker [26]essentially saying that this is an investment that

at least the broker believed had a good opportunity to increase in value?

A Well, certainly.

Q And Ms. Bartlett didn't make any such statement to you, correct, with respect to this investment? That this was an investment that was likely to return a profit in the future, did she?

A She believed that the indication I had was that there was a possibility of making a profit, yes.

Q And what did she -- did she give you any specifics with respect to that as to how much or how you'd make a profit? Anything at all in terms of you can recall?

A No, I think a fair return was what I expected.

Q And what did you at that time consider to be a fair return?

A More than I put into it.

Q Did you have anything in mind in terms of a percentage increase, ten percent, fifty, a hundred? Something like that?

A No, I did not.

Q And did you have any information with respect to what percentage return you might recover on this investment?

A No, my understanding of investing is that the best policy is to diversify and some investments will fail and some will have a big return. And so this was certainly not -- this is what I would have -- this is what I consider an uncorrelated [27]asset. You know, if you look at the grand scheme of events, this is something that might really be good, might not.

Q Well, and I just want to understand what information you had that led you to believe that it might be really good.

MR. HARTMAN: I object, Your Honor, he's already asked the question. Dr. Rabkin has answered it more than once.

THE COURT: Sustained.

BY MR. WHITWELL:

Q You had never purchased a claim in bankruptcy before, correct?

A Correct.

Q So is it fair to say that you had no familiarity with this particular type of investment prior to making the purchase of this claim?

A Correct.

Q Now I'm not going to ask you any additional questions with respect to your relationship with Ms. Bartlett except

for one. Is your relationship with Ms. Bartlett and was -- I'll break them up. At the time that you purchased the claim, did you have a romantic relationship with Ms. Bartlett?

MR. HARTMAN: I object, Your Honor, that's vague and I don't think it's relevant at all.

THE COURT: Well, I think he testified in his deposition that he did.

MR. HARTMAN: Okay.

[28]THE COURT: You may answer, Doctor.

THE WITNESS: Yes.

BY MR. WHITWELL:

Q And do you still have a romantic relationship with

Ms. Bartlett?

A Yes.

Q I was asking you just over the last few questions about what information you had in terms of documents and things like that but just to clarify, you also had no information with respect to the bankruptcy proceedings that had occurred at the time that you purchased your claim, correct?

A Correct.

Q And you've never received schedules or other documents relating to the ongoing proceedings in the bankruptcy until very recently reviewing the plan, is that correct?

A I received documents very recently but at the time, you're correct, I did not have any documents.

Q And even after the initial purchase, you did not ask to start receiving regularly the documents that a creditor might normally receive in connection with a bankruptcy proceeding?

A That's correct.

Q How did it come about that you very recently looked at some documents with respect to the bankruptcy proceeding?

A I received a deposition and with that, there were some documents.

[29]Q So it was in connection with your preparation for that deposition?

A Correct.

Q And after your deposition until -- well let me ask a question before that. You recently voted on approval of the Debtor's plan of reorganization, correct?

A Correct.

Q And you voted in favor of that plan of reorganization, correct?

A Correct.

Q Did you have an understanding at least at the time that you voted what you would receive on your claim if the plan of reorganization is approved by the Court?

A My understanding -- my vote was submitted after discussion with my attorney and with the understanding that the amount that I would be -- that I would receive would be amended.

Q I'm not sure if I followed but let me just ask it again. Do you understand -- do you have an understanding with respect to the dollar amount that you will be paid on your claim if the Debtor's plan of reorganization is approved?

A My understanding is that the plan will be amended and that this will be or that I'm hoping that it will be amended.

Q Okay. Do you have an understanding that if it's as you described amended, how much you'd be receiving on your claim?

A I don't know that amount.

[30] So even as you sit here today, you don't have any number in mind that you think you're going to be paid on this claim, is that correct?

A My understanding is that the plan will be amended -- my understanding was that the plan had been amended but apparently had not been. The initial plan was for $5,000 to be paid each quarter for three years. At this point, I believe that there is another amendment which provides for $30,000 lump sum payment. However, having looked at all that, my vote was submitted with the understanding that certainly with all the legal expenses and everything, I'm going to have a lot more invested here. And with the offer by the bank that my claim had a value that was much more than $30,000, my understanding is that the plan will be amended. That it doesn't have -- it will not be submitted until the end of September. And that's what I'm hoping for.

Q And that if that process takes place, that you'll receive an amount under this potential amendment that's in excess of the 30,000?

A Yes.

Q And that was your understanding at the time that you voted in favor of the plan of reorganization that's currently pending?

A Yes.

Q You said something in your direct examination and I just [31]want to make sure I understood it. You made a comment with respect to the offer that you didn't think it was allowed, something to that effect and I just want to clarify. You did understand that you were allowed if you had chosen to to accept the offer and accept the 60 or $50,000 payment for your claim, is that correct?

A Yes.

Q Okay. And nevertheless, you did choose to turn down that 60 and then later $50,000 offer?

THE COURT: I think you have that backwards.

MR. WHITWELL: Well, it was 50 -- let me just clarify.

BY MR. WHITWELL:

Q The initial statement at the deposition was 50,000, correct?

A Yes.

Q And then you were told that if you would accept the offer that day, you'd be paid 60,000, correct?

A Yes.

Q And then when you said no, that you wanted to consider it, you were told that you had a certain number of days to accept the offer but it would have been at the $50,000 amount, correct?

A Yes.

Q Okay. And after -- well basically you rejected that offer [32]by allowing the number of days that you'd been given to consider it and to expire and thereby made a decision effectively to reject that offer?

A Yes.

Q And throughout this period, both the time that you purchased the claim and all the way up to sitting here today, your only motivation in purchasing this claim was as an investment and to make money on the investment, is that correct?

A Well, I think that there is some value in having this -- having local ownership of this property. I also feel that I'm proud of the community. But I also would hope to make some profit on it, yes.

Q Those factors that you just mentioned with respect to local ownership, et cetera, those were not factors that went into your initial decision to purchase the claim, correct?

A Correct.

Q Because you weren't aware of the bankruptcy or the effect of any of this on local ownership or anything like that, correct?

A Yes, that's correct.

* * *

[33]THE COURT: I have a couple questions to kind of fill out some of my questions. In looking at the cases that involve whether a person is an insider or not an insider, there's a number of other questions that came up which I'd like you to answer for me please. Does Ms. Bartlett use your credit cards?

THE WITNESS: No, Your Honor.

THE COURT: Do you use hers?

THE WITNESS: No, Your Honor.

THE COURT: Have you purchased any significant items for her such as an automobile or something like that?

THE WITNESS: No, Your Honor.

THE COURT: Do you provide her with a vehicle or anything like that?

THE WITNESS: No, Your Honor.

THE COURT: Okay. Is a $5,000 investment a significant investment in your opinion?

THE WITNESS: In terms of my overall net worth, it is not.

THE COURT: Okay. I have nothing. Does anybody want to cross with respect to those questions?

* * *

[34]THE COURT: Next witness.

MR. SMITH: I call Kathy Bartlett.

THE COURT: Ms. Bartlett, would you please step forward and be sworn.

THE CLERK: Please raise your right hand.

KATHLEEN SKYLER BARTLETT,
WITNESS, SWORN

DIRECT EXAMINATION

BY MR. SMITH:

Q And Ms. Bartlett, state your name please for the record?

A Kathleen Skyler Bartlett.

Q Ms. Bartlett, what do you do for a living?

A I'm a realtor with Dixon Realty.

Q And how long have you been doing that?

A A little more than eight years.

Q Okay. Do you have a relationship with MBPEP-1?

A I do.

Q What's your relationship?

A I'm an investor through my late husband's 401(k).

Q And if -- I'm just going to refer to it as MBP. Do you understand what I mean when I say that? Is MBP a limited liability company?

A Yes.

Q Are there other members?

A There are.

Q How many?

A Approximately 12 in different -- a couple of people have invested through perhaps two different mechanisms. Maybe retirement accounts for example.

Q And with respect to -- first of all, what's the relationship between MBP and the Debtor, Village at Lakeridge?

A The Village -- MBPEP has one asset which is the Village at Lakeridge.

Q Okay. And when it comes to making decisions for MBP, how are those done?

A There is a board of managers of which I am one.

Q Okay. How many others?

A Four.

Q Okay.

A And we have a certain amount of authority and major decisions are made by the full investor group.

Q Do you have ability to make decisions on your own [36] individually?

A I do not.

Q Okay. And you've heard the testimony about the sale of the claim, MBP's claim. Who made the decision to sell that claim?

A The investor group.

Q Was there an actual meeting held at which that was discussed?

A Yeah.

Q And voted upon?

A There was a meeting of the board of managers and the vote was made I believe via email.

Q Okay.

A And phone calls.

Q Why was the decision made to sell the claim?

A The claim was -- we knew we couldn't vote that claim ourselves. It wasn't really worth anything to us. At some point last year, it was suggested by somebody and I can't recall who, that there may be a tax advantage in selling that claim. So we decided to sell it.

Q Were those issues considered by all the member -- or the managing members at the time of the meeting?

A Yes.

Q At the time you made the decision, by you I just mean your group, did you also discuss who you might sell that claim to?

[37]A There were -- yes, at one point there were different names of potential buyers put on the table and after some discussion, I agreed to talk to Dr. Rabkin about it.

Q And did you in fact talk to Dr. Rabkin?

A I did.

Q Okay. And when was that? Do you recall when you first approached him?

A It was last fall. It may have been September initially. And we had -- at first he was intrigued by the idea. I know he went and walked the property. I know I shared a rent roll with him. And then he made the decision to buy the claim I believe mid-October.

Q So between --

A I think it was around October 17th.

Q Okay. So between your initial meeting with Dr. Rabkin and his ultimate decision, was the issue of purchasing the

claim discussed between yourself and him? In other words, more than one occasion?

A Prior to him purchasing it?

Q Between the time when you initially brought it up to him and the time when he actually bought it, did you have discussions in between those two periods?

A We did.

Q Okay.

A I mean general discussions about the nature of the [38] property.

Q Okay. And do you recall what you told him? What you represented to him?

A I think we may have had discussions about the tenants in the property. I remember sharing a rent roll with him and talking about tenants and tenant prospects.

Q Okay. Do you recall anything else of what you told him? Did you tell him anything about the bankruptcy case?

A Well, he knew we were in bankruptcy. But no, not beyond that.

Q Now in any of your discussions with Dr. Rabkin, did you discuss what he would receive in the bankruptcy case?

A Not beyond the idea that he could make money on his investment. But we also talked about the possibility that he may not get anything.

Q Did you at all discuss whether he would vote in favor of the Debtor's plan?

A No, no.

Q You got to wait for me to finish the question. Thank you. Did you ever discuss with him that his vote would be needed in order to confirm the Debtor's plan?

A No.

Q Did you give Dr. Rabkin a copy of the plan of reorganization?

A No.

[39]Q Have you ever given him a copy of the plan?

A No.

Q Okay. Has he ever asked your opinion prior to voting on whether or not he should vote in favor of the plan?

A We did not discuss the bankruptcy except an occasional comment about how we weren't discussion the bankruptcy. Until last Friday.

Q Okay. And what happened last Friday?

A I received a phone call from Dr. Rabkin in the morning. I had a very full workday and he told me that he had to submit his ballot either accepting or rejecting the bankruptcy plan by the end of the day. And I told him that I didn't know anything about that. He said and that I didn't think we should discuss it. And he said he had been in communication with your office and that we needed to talk about it, that it was okay to discuss it. And so we made arrangements or made a plan to meet at the end of the day and talk about it.

Q And did you in fact do that?

A We did.

Q What did you talk about?

A He explained to me that he felt that he wanted more money. He was incurring legal fees that he hadn't anticipated. And I think there was a comment about the banks being paid back over ten years and I explained that I couldn't make any decisions on behalf of the [40]group. That that was a decision that would have to be taken to the full group of investors.

Q Is that a matter that you do intend to take to the full group of investors?

A Yes.

Q And do you understand that his vote now is dependent upon some modification to the plan?

A That's what I've been told.

Q All right. Now with regard to your relationship with Mr. -- with Dr. Rabkin, how long have you known him?

A Approximately two years.

Q And you heard his testimony that you met in connection with a home sale. Do you agree with that?

A Yes, he came to look at a property that I had listed and later asked me to represent him in his search for a home in Reno. He was living in Incline Village at the time.

Q And at some point then thereafter you dated, is that correct?

A Yes.

Q Okay. And you're still -- you still date?

A Yes.

Q Okay. And I think the term has been a romantic relationship -- you have a romantic relationship?

A I guess.

Q Why do you say I guess?

[41]A Well, no -- yes.

Q Okay. Do you -- have you loaned any money to Dr. Rabkin?

A No.

Q Has he loaned any money to you?

A No.

Q Anticipating the Judge may have similar questions, do you have a -- do you share a credit card in any way?

A No.

Q Has he given you any gifts of significance?

A No.

Q Have you given him any gifts of significance?

A No.

Q Okay. Are your finances in any way intertwined?

A No.

Q All right.

A We date and we share expenses equally.

Q Do you live together?

A No.

Q Now other than the sale of the claim, the MBP claim, to Dr. Rabkin, was there any other agreement with Dr. Rabkin made?

A No.

Q Okay. For example, was there ever a guarantee made by you that he would get his money back?

A No.

Q Okay. Was there any promise to him that he would receive [42]anything?

A No.

* * *

CROSS EXAMINATION

BY MR. WHITWELL:

Q Ms. Bartlett, just a very few questions following up on some of the things you said. I believe that you testified that in connection with the considerations to sell the claim, that the group understood that you could not vote the claim, correct?

A The understanding of the group was that the claim because we've gone into bankruptcy had no value to us.

Q And I understand that and I just wanted to follow up though on the part of that answer before where you said that we could not vote the claim. Do you recall testifying to that a few minutes ago?

A Yes.

Q And what you were referring to there was that MBE (sic) could not vote the claim?

A Yes, we had a vague understanding of that at the time.

Q And did you understand that or believe anyway that if the claim was sold to a third party, that that third party could then vote the claim?

[43]A We understood that that was a possibility, yes.

Q And that went into your considerations as to whether to sell the claim, correct?

A Yeah, but I think the discussions at the time focused more on the idea that there may be a tax advantage.

Q So it wasn't the only consideration but it was a consideration, the voting part?

A It was part of our discussions, yes.

Q Okay. You testified that there were discussions amongst your group with respect to several potential purchasers of the claim, is that correct?

A There were a few, yes.

Q The only purchaser that was approached was Dr. Rabkin, correct?

A Correct.

Q And why was that? Why didn't you not approach several potential purchasers to see that you could get the most for the claim possible?

A We talked about different potential buyers and frankly I don't recall how we settled on Dr. Rabkin. But he was around. He was in town. And he seemed like the most viable candidate at the time. I'm sorry, I can't give you any more specifics than that.

Q Fair enough. The group -- did the group discuss the price that they would be asking Dr. Rabkin to pay for the claim.

[44]There was some discussion, yes.

Q And did the group then arrive at the $5,000 price?

A Yes.

Q And you proposed that $5,000 price to Dr. Rabkin, correct?

A I did.

Q Did he suggest that he might be interested but try and get the price any lower than the 5,000?

A No.

Q Okay. Just one last thing. I believe you testified, I just want to make sure I heard it correctly, that it was your understanding after your discussions with Dr. Rabkin recently, that his vote in favor of the plan is dependent on the submission of an amended plan in which he would receive more than the 30,000 called for by the current plan, is that correct?

A That's what I've been told.

* * *

[64]MR. OWENS: -- I'd like to get to the second issue. The second issue is whether Dr. Rabkin is an insider himself.

THE COURT: No, I don't think so. Because I've read the various cases that talked about a non-statutory insider because --

MR. OWENS: Right.

THE COURT: -- of a romantic relationship, and all of them have very much more significant relationships between the parties than was -- than occurred here. So

I really don't think that Dr. Rabkin is a non-statutory insider. I mean, you're not precluded in life from having romantic relationships with people or from having friends. When you have sort of a quasi-marital relationship, those are what the cases seem to do. And that certainly is not the case here.

MR. OWENS: Well, and Your Honor, if I may have an opportunity to at least address these issues?

THE COURT: Sure.

MR. OWENS: The cases look to whether the transaction [65]was an arm's-length transaction. And that's cited from the legislative history directly. There's also a control test that is oftentimes applied, but in -- more in the business sense; that doesn't apply here because it's obvious that Dr. Rabkin doesn't have any control over the Debtor. It's really the latter. It's the relationship between Dr. Rabkin and Ms. Bartlett is what would be indicative of a non-arm's-length transaction.

But I want to make clear that we're not relying simply on their relationship itself. That is just one factor of the totality of circumstances test. And this is sort of a mixed findings of law and fact in terms of the facts are what they are and the application of the facts are conclusions of law or how they're applied.

Here, what are the facts? We have an assignment to Dr. Rabkin for $5,000.00 of a $2.7 million claim only 11 days before the disclosure statement. It so happens that

that claim is necessary to be able to create an impaired assenting class. There are no other creditors other than US Bank.

At his deposition, Dr. Rabkin testified that he was approached by Ms. Bartlett with the proposal to buy the entire claim from MBP and then he paid $5,000.00 for the claim; that's consistent with the testimony here today. Dr. Rabkin didn't recall any of the other material details about the claim or the meetings with Ms. Bartlett. Ms. Bartlett today at this hearing [66]provided some additional information regarding the meetings. But there weren't very many meetings. There were some discussions about selling the claim.

Dr. Rabkin testified that he had not seen or received the Debtor's plan, the disclosure statement, the schedules or the assignment of claim prior to his June 7th deposition. He did not know whether MBP had filed a proof of claim in the bankruptcy case or even whether the claim had been scheduled. He didn't know whether the notice of claims -- assignment of claim had been filed with the Court. And he did testify -- I mean, he's testified that he's an experienced investor, but he had not done any due diligence other than visiting the Debtor's property to determine whether the purchase of the insider claim was a good business investment.

And we query how visiting a property if you're the holder of a claim is really due diligence on the claim itself. What is your likelihood of seeing a return on the investment? But that was the only due diligence that he had done was he had visited the property.

Dr. Rabkin testified that he was not served with any notices of the bankruptcy case. He was unfamiliar with how the Debtor's proposed to treat the insider claim under the Debtor's plan or the amount of the proposed payments to unsecured creditors under the plan. He testified that he had bought the claim as a business investment, and that he had no interest in [67]the Debtor other than getting paid his $30,000.00 on the Rabkin claim. And we cited to that in the deposition transcript on page 85.

He testified that he was concerned that he may run up a lot of expense and get paid nothing. He also testified that if $30,000.00 was the maximum that he would get paid under the plan, that he would be happy to get paid $50,000.00. And we cite to page 86 of the transcript.

Despite this testimony, he did not accept the lender's offer to purchase the claim for $50,000.00 or later $60,000.00. And he's under no obligation to do that. And again, I apologize to Dr. Rabkin if he was offended by the proposal. But he did testify at the deposition that he had made a business decision to acquire the claim for $5,000.00.

THE COURT: I just don't think you can -- I mean, you've got somebody in a deposition, the lawyer offers him a check unannounced; that's just not the way business is done. And I frankly don't think that's the way depositions should be conducted. So it doesn't surprise me that Dr. Rabkin would be offended by that, because I certainly would be. And if I was opposing counsel, I would have been offended by that. I just don't think that's a fair -- I

just don't think the manner in which that was presented gives rise to much of anything in terms of my decision. But go ahead.

MR. OWENS: Just to point out -- and again, Your [68]Honor, I do apologize personally if he was offended.

THE COURT: I understand.

MR. OWENS: But I will say that in the *Figter* 9th Circuit case, and that was outside of a deposition setting, that --

THE COURT: I mean, you can buy and sell claims; there's no problem with that.

MR. OWENS: Right.

THE COURT: I just think that that's a highly inappropriate setting to try and do it.

MR. OWENS: Fair enough, Your Honor. But if I can respond and just say that --

THE COURT: Go ahead.

MR. OWENS: -- when we did -- when he did say that it was a business investment and that he'd be happy with $30,000.00 -- satisfied with $30,000.00 and when the bank offers to pay him up to twice as much without any risk, without incurring any more expenses, I'm not saying that's dispositive of any issue. All I'm saying is that was one fact

to indicate that this may not have been a real investment, that it may have been a favor to a friend. That's the point.

THE COURT: Are favors to friends prohibited?

MR. OWENS: No, they're not, Your Honor, unless you're acting in a way -- and we can get to the bad faith later. Favors to a friend are not prohibited. But I think [69]that then the Court has to examine whether that transaction is an arm's-length transaction that was done in bad faith.

THE COURT: Okay.

MR. OWENS: And I haven't reached that issue yet, but that --

THE COURT: Okay. Go ahead.

MR. OWENS: Okay.

THE COURT: You have to finish up in about 12 minutes because I have a noon meeting I have to attend.

MR. OWENS: I'll be done in five, Your Honor. Thank you. We cited to the *Flynn Hill* decision where the court designated the claim of an assignee, Terrant, whose principal was a friend and business partner of the debtor, his general partner. Assuming that the plan was confirmed, the best possibly return to Terrant was expected to be about five percent on its claim. On cross-examination, Terrant's principal testified that he was not

interested in being paid by the other plan proponent the face amount of the claim with 15 percent interest or that he wouldn't accept more than twice the amount of the claim. And the bankruptcy court found that Terrant's purchase of the debtor's obligations was not a reasonable -- carefully reasoned business decision but instead an accommodation to a friend or a business partner. We cite this in the reply brief, this decision. And this is exactly what's going on here in this case, Your Honor.

THE COURT: Well, that's -- you're in the land of legalized gambling here. It's not, you know, it's like putting $50 into the slot machine for Megabucks. Maybe you'll win $50,000 or five million dollars. Maybe you'll lose it. I mean but the concept of gambling is not unknown here.

* * *

[77](Recess)

THE CLERK: All rise.

THE COURT: Good afternoon, please be seated. This is going to be my decision in the case of the Village at Lakeridge. I'd like to thank counsel. They all did a good job. Your briefs were helpful and good. This I think is kind of a difficult case and I think you all did a fine job in presenting your clients.

With respect to Dr. Rabkin being treated as an insider, I do not find that Dr. Rabkin is a non-statutory insider because of his relationship with Ms. Bartlett. The cases

that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that would support it.

I don't think that there was any control by either [78] Dr. Rabkin or Ms. Bartlett. Ms. Bartlett is one of only five people who, I'm sorry, one of five people who are on the management committee of the insider and from what I could tell, Dr. Rabkin didn't have any influence on them. So I don't find that he controls the insider either.

I also don't find that Dr. Rabkin's claim was bad faith. I reject the concept that someone acquiring a claim to vote in favor of a plan absent something improper about voting in favor of the plan constitutes bad faith. I think in the right circumstances, someone could certainly acquire a claim and want to vote in favor of the plan. I think -- I don't think that would be bad faith.

Certainly, there was not much due diligence done by Dr. Rabkin in this case. But his purchase was -- the cost of buying the claim was relatively small. It wasn't significant in the overall scheme of Dr. Rabkin's finances or his various investment properties. It had the potential for a big payoff. And I don't think that the people speculating on the possibility of getting paid on claims is a bad motive. And I think that's all he had here.

I think the fact that he rejected the effort to buy his claim during the course of his deposition is really not surprising given the circumstances. Someone presented him with a check that was written out in his name during the course of his being examined under oath and after some considerable [79]period of examination, as I indicated, I think that was not a good plan on the part of whoever came up with it. I understand the doctor or many people would have been put off by that kind of approach and I don't think it's at all surprising that he would reject it and not really be interested in dealing with the people who made the offer to him thereafter.

So I don't find that there's any bad faith on the part of Dr. Rabkin. And I don't find that he's a non-statutory insider because of his relationship with Ms. Bartlett.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-60038

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, ET AL., BY
AND THROUGH CWCAPITAL ASSET
MANAGEMENT LLC, SOLELY IN ITS
CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

No. 13-60039

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, ET AL., BY
AND THROUGH CWCAPITAL ASSET
MANAGEMENT LLC, SOLELY IN ITS
CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel.
BAP No. 12-1456, BAP No. 12-1474.
Kirscher, Pappas, and Taylor,
Bankruptcy Judges, Presiding.

Argued and Submitted, October 22, 2015
San Francisco, California

MEMORANDUM*

Before: CLIFTON and N.R. SMITH, Circuit Judges, and LASNIK,** District Judge.

The bankruptcy court did not err in declining to designate Rabkin's claim as being assigned and voted in bad faith pursuant to 11 U.S.C. § 1126(e). We affirm.

We review for clear error the bankruptcy court's finding that a party acted in good faith. *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.)*, 118 F.3d 635, 638 (9th Cir. 1997). In reviewing a decision for clear error, we

> may *not* look to what we would have done had we been in the trial court's place in the first instance, because that review would be de novo and without deference. Rather, the scope of our review limits us to determining whether the trial court reached a decision that falls within any of the permissible choices the court could have made.

United States v. Hinkson, 585 F.3d 1247, 1261 (9th Cir. 2009) (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949)).

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert S. Lasnik, District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

Under § 1126(e), "the court may designate any entity whose acceptance or rejection of [a reorganization] plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." Acceptance or rejection is made in bad faith if a creditor is "not attempting to protect [his] own proper interests, but [is], instead, attempting to obtain some benefit to which [he is] not entitled," such as an "untoward advantage over other creditors for some ulterior motive." *In re Figter Ltd.*, 118 F.3d at 638-39. Ulterior motives include "malice, 'strikes' and blackmail," or attempts to "destroy an enterprise in order to advance the interests of a competing business." *Id.* at 639 (citation omitted). A creditor who attempts "to preserve what he reasonably perceives as his fair share of the debtor's estate" does not act in bad faith. *Id.* (citation omitted). However, a debtor's attempt to sell claims against itself to "an insider or affiliate for the purpose of blocking a plan, or fostering one [has been] seen as a badge of bad faith." *Id.*

The bankruptcy court considered all relevant facts and concluded Rabkin did not vote for Lakeridge's reorganization plan in bad faith. The court acknowledged that Rabkin had not conducted much due diligence, but noted that the claim's purchase price was "relatively small" and "had the potential for a big payoff." The court determined that Rabkin had engaged in speculative investing with no bad motive. The court also acknowledged that Rabkin had refused to accept U.S. Bank's offer to buy his claim for more than he could recover under the proposed reorganization plan, but noted that Rabkin's refusal was "really not surprising given the circumstances." The court cited U.S. Bank's heavy-handed tactics during Rabkin's deposition as one reason Rabkin simply may not have

"be[en] interested in dealing with the people who made the offer." Finally, the court noted that Bartlett had not asked Rabkin to vote in favor of Lakeridge's reorganization plan.

Although we may not have reached the same result as the bankruptcy court had we been sitting in its place, we cannot say the court's decision was clearly erroneous. U.S. Bank has not proven that Rabkin had ulterior motives for voting in favor of the confirmation plan. Nor has U.S. Bank proven that Rabkin was an insider, such that Lakeridge acted in bad faith by assigning Rabkin the claim. Therefore, the BAP's holding, affirming the bankruptcy court's decision on bad faith, is **AFFIRMED**.

SUPREME COURT OF THE UNITED STATES

No. 15-1509

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, *et al.*,

v.

THE VILLAGE AT LAKERIDGE, LLC, *et al.*

Filed: March 27, 2017

ORDER

The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

No. 15-1509

FILED
JUN 12 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL. BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals erroneously applied a clear error standard of review for determining non-statutory insider status under the Bankruptcy Code where the material facts were undisputed, rather than a *de novo* standard of review applied by the majority of circuit courts that have addressed the issue.

PARTIES TO THE PROCEEDING

The following list provides the names of all parties to the proceedings below:

Petitioner, the appellant below, is U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Trustee, as Successor by Merger to LaSalle Bank National Association, as Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), by and through, CWCapital Asset Management LLC ("CWCAM"). CWCAM is the Special Servicer for the Trust.

Respondent, the appellee below, is The Village At Lakeridge, LLC.

Robert Alan Rabkin, M.D. is a party-in-interest who purchased the $2,761,000 insider claim for $5,000, but who has not participated in the appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly-held entity owns 10% or more of the stock of U.S. Bancorp.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Introductory Statement 2

B. Bankruptcy Filing, Pertinent Parties, and Key Principals 4

C. Chapter 11 Plan, Disclosure Statement, and Assignment of the Insider Claim 6

D. U.S. Bank's Motion to Designate Rabkin's Claim as an Insider Claim and to Disallow His Claim for Voting Purposes 9

Table of Contents

Page

E. The Bankruptcy Court's Order Granting the Designation Motion in Part and Denying It in Part....12

F. Appeals....14

SUMMARY OF ARGUMENT....16

ARGUMENT....19

I. The Question of Who Is a Non-Statutory Insider under the Bankruptcy Code Is a Mixed Question of Law and Fact....19

A. The Statutory Framework and the Bankruptcy Court's Decision....19

B. The Bankruptcy Court Decided More than a Pure Factual Issue....23

1. Insider Status Is Not a Historical Fact....24

2. Insider Status Is a Mixed Question of Law and Fact....29

II. Mixed Questions Such As Determinations of Insider Status Should Be Reviewed *De Novo* Because They Involve Much More Than a "Neat Comparison of Fact to Law"....34

Table of Contents

Page

A. Questions Applying a Particular Standard, Establishing Norms, Determining Broadly Applicable Policy, or Deciding Ultimate Issues, Are Legal in Nature and Thus Require *De Novo* Review 34

1. The Predominance of Law or Fact Test 37

2. The Historical Test 42

3. The Functional Analysis Test 46

4. The "Ultimate Issue" Test 52

B. All of the Applicable Tests and Considerations for Resolving the Standard of Review for Mixed Questions of Law and Fact Support *De Novo* Review of Non-Statutory Insider Determinations 53

CONCLUSION 57

APPENDIX TABLE OF CONTENTS

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 4 ..... 1a

11 U.S.C. § 101(9) 1a

11 U.S.C. § 101(31) 2a

11 U.S.C. § 102 ..... 4a

11. U.S.C. § 503(c) 6a

11 U.S.C. § 544 ..... 9a

11 U.S.C. § 547(b) 11a

11 U.S.C. § 548(a) 13a

11 U.S.C. § 550(c) 15a

11 U.S.C. § 702(a) 16a

11 U.S.C. § 727(a) 17a

11 U.S.C. § 747 ..... 22a

11 U.S.C. § 1129(A) 23a

Unif. Fraudulent Transfer Act § 1 (1984) 30a

Appendix Table of Contents

Page

Unif. Fraudulent Transfer Act § 4 (1984) 35a

Unif. Fraudulent Transfer Act § 5 (1984) 38a

Unif. Voidable Transactions Act § 1 (1984) 39a

Unif. Voidable Transactions Act § 4 (1984) 45a

Unif. Voidable Transactions Act § 5 (1984) 48a

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Bessemer City,
470 U.S. 564 (1985).....51

Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.),
531 F.3d 1272 (10th Cir. 2008).....31-32, 33

Associates Commercial Corp. v. Rash,
520 U.S. 953 (1997).....7

In re Bammer,
131 F.3d 788 (9th Cir. 1997)..... 43, 45

Bank of Am. Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999).....55

Baumgartner v. United States,
322 U.S. 665 (1944).....19, 52

Bogardus v. Comm'r,
302 U.S. 34 (1937).....39

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984).....38

Browning Interests v. Allison (In re Holloway),
955 F.2d 1008 (5th Cir. 1992)..... 32, 34, 46

Cited Authorities

Page

Chandris, Inc. v. Latsis,
515 U.S. 347 (1995) 18, 22, 41

Comm'r v. Duberstein,
363 U.S. 278 (1960) 37, 38, 49

Cooter & Gell v. Hartmax Corp.,
496 U.S. 384 (1990) 51

DHHS v. Smitley,
347 F.3d 109 (4th Cir. 2003) 45

Educ. Credit Mgmt. Corp. v. Jesperson,
571 F.3d 775 (8th Cir. 2009) 44

Educ. Credit Mgmt. Corp. v. Polleys,
356 F.3d 1302 (10th Cir. 2004) 44

Estate of Merchant v. Comm'r,
947 F.2d 1390 (9th Cir. 1991) 38

Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.),
926 F.2d 1458 (5th Cir. 1991) 32, 36, 45

First Nat'l Bank of Durango v. Woods (In re Woods),
743 F.3d 689 (10th Cir. 2014) 18, 42, 43

Flying J, Inc. v. Comdata Network, Inc.,
405 F.3d 821 (10th Cir. 2005) 43

Cited Authorities

Page

Harvey ex rel. Lankenbaker v. United Transp. Union, 876 F.2d, 1235 (10th Cir. 1989) 43

Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1937).....39

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986).....40

Indmar Prods., Inc. v. Comm'r, 444 F.3d 771 (6th Cir. 2006) 43

Koch v. Rogers (In re Broumas), 135 F.3d 769 (table), 1998 WL 77842 (4th Cir. Feb. 24, 1998)..... 32, 36, 46

In re Krehl, 86 F.3d 737 (7th Cir. 1996).....32

In re Kunz, 489 F.3d 1072 (10th Cir. 2007) 22

Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549 (8th Cir. 2003) 45

In re Longview Aluminum, L.L.C., 657 F.3d 507 (7th Cir. 2011).....17, 31, 33, 45

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 46

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Page

McDermott Int'l, Inc. v. Wilander,
498 U.S. 337 (1991) 18, 40

McLane Co. v. E.E.O.C.,
— U.S. —, 137 S. Ct. 1159 (2017) 18, 34, 42, 46

Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.),
144 Fed. Appx. 72 (11th Cir. 2005) 32, 33

Miller v. Fenton,
474 U.S. 104 (1985) ..... *passim*

New Era Publ'ns Int'l, ApS v. Carol Pub. Grp.,
904 F.2d 152 (2d Cir. 1990) 43

Ornelas v. United States,
517 U.S. 690 (1996) ..... *passim*

Panduit Corp. v. Dennison Mfg. Co.,
810 F.2d 1561 (Fed. Cir. 1987) 44

Pepper v. Litton,
308 U.S. 295 (1939) 55

Piedmont Minerals Co. v. United States,
429 F.2d 560 (4th Cir. 1970) 44

Pierce v. Underwood,
487 U.S. 552 (1988) 34, 42, 46, 51

Page

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456 U.S. 273 (1982) ..... *passim*

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639, 132 S. Ct. 2065 (2012) 7

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 33, 47, 49

Schlumberger Res. Mgmt. Servs., Inc. v. CellNet Data Sys., Inc. (In re CellNet Data Sys., Inc.),
327 F.3d 242 (3d Cir. 2003) 43

Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.),
554 F.3d 382 (3d Cir. 2009) 17, 31, 33

Sw. Marine, Inc. v. Gizoni,
502 U.S. 81 (1991) 40

Tenn. Student Assistance Program v. Hornsby (In re Hornsby),
144 F.3d 433 (6th Cir. 1998) 44

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
— U.S. —, 135 S. Ct. 831 (2015) 53

Thomas v. Gen. Motors Acceptance Corp.,
288 F.3d 305 (7th Cir. 2003) 45

Page

Till v. SCS Credit Corp.,
541 U.S. 465 (2004) 7

United States v. Arvizu,
534 U.S. 266 (2002) 49

United States v. Brown,
631 F.3d 638 (3d Cir. 2011) 38

United States v. Gaudin,
515 U.S. 506 (1995) 27

United States v. Gen. Motors Corp.,
384 U.S. 127 (1966) 39, 51

United States v. McConney,
728 F.2d 1195 (9th Cir. 1984) 38, 39

United States v. Parke, Davis & Co.,
362 U.S. 29 (1960) 18, 39

Williams v. Mehra,
186 F.3d 685 (6th Cir. 1999) (en banc) 52

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Page

STATUTES AND OTHER AUTHORITIES

United States Constitution, article I, section 8, clause 4 5

11 U.S.C. § 101 2

11 U.S.C. § 101(9) 1

11 U.S.C. § 101(31) ..... *passim*

11 U.S.C. § 102 1

11 U.S.C. § 102(3) 21

11 U.S.C. § 503(c) 1, 49

11 U.S.C. § 523(a)(8) 44

11 U.S.C. § 544 ..... 1, 49, 56

11 U.S.C. § 547 56

11 U.S.C. § 547(b) 1

11 U.S.C. § 547(b)(4)(B) 49

11 U.S.C. § 548 ..... 49, 56

11 U.S.C. § 548(a) 1

11 U.S.C. § 550 ..... 49, 56

Cited Authorities

Page

11 U.S.C. § 550(c) 1

11 U.S.C. § 702(a) 1

11 U.S.C. § 702(a)(3) 49

11 U.S.C. § 727(a) 1, 56

11 U.S.C. § 727(a)(7) 49

11 U.S.C. § 747 1

11 U.S.C. § 747(1) 49

11 U.S.C. § 1111(b) 6, 7

11 U.S.C. § 1126(e) 9

11 U.S.C. § 1129(a) 2

11 U.S.C. § 1129(a)(5)(B) 49

11 U.S.C. § 1129(a)(10) 8, 12, 14, 49

11 U.S.C. § 1129(b)(2)(A) 7

28 U.S.C. § 1254(1) 1

H.R. REP. No. 95-595 (1977) *reprinted in* 21
1978 U.S.C.C.A.N. 5963 21

Page

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Uniform Fraudulent Transfer Act § 1 2

Uniform Fraudulent Transfer Act § 4 2

Uniform Fraudulent Transfer Act § 5 2

Uniform Voidable Transactions Act § 1 2

Uniform Voidable Transactions Act § 4 2

Uniform Voidable Transactions Act § 4(b) 56

Uniform Voidable Transactions Act § 5 2

Uniform Voidable Transactions Act § 5(b) 56

HARRY T. EDWARDS, *ET AL.*, FEDERAL STANDARDS OF REVIEW (2d ed. 2013) 24, 31, 33, 34

Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) 24, 38

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported as *U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016). The decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit (Pet. App. 28a-60a) is not reported in the Bankruptcy Reporter, but is available at *The Village at Lakeridge, LLC v. U.S. Bank National Association (In re The Village at Lakeridge, LLC)*, BAP No. NV-12-1456, 2013 WL 1397447 (B.A.P. 9th Cir. Apr. 5, 2013). The opinion of the United States Bankruptcy Court for the Central District of California granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as an Insider Claim, or (B) Disallow Such Claim for Voting Purposes (August 20, 2012) (Pet. App. 61a-70a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 8, 2016 (Pet. App. 1a-27a), and denied a timely petition for rehearing en banc on March 16, 2016 (Pet. App. 71a-73a). Petitioner filed a timely petition for certiorari on June 13, 2016, which this Court granted in part with respect to Question 2 presented by the petition on March 27, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the United States Constitution, article I, section 8, clause 4; sections 101(9), 101(31), 102, 503(c), 544, 547(b), 548(a), 550(c), 702(a), 727(a),

747, and 1129(a) of title 11 of the United States Code; sections 1, 4, and 5 of the Uniform Fraudulent Transfer Act; and sections 1, 4, and 5 of the Uniform Voidable Transactions Act.

STATEMENT OF THE CASE

A. Introductory Statement.

This case squarely raises Justice Stevens' still-unanswered question regarding:

> . . . the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i.e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

Specifically, this appeal addresses the standard of appellate review that should be applied when reviewing a lower court's determination of whether a creditor is an "insider" under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). The Bankruptcy Code sets forth a largely open-ended definition of insider status, listing a series of examples but otherwise leaving it to the courts to decide who is an insider. *See* 11 U.S.C. § 101(31). Accordingly, unless an individual or entity fits within the expressly enumerated examples for statutory insiders under section 101(31), the Bankruptcy Code allows

courts to develop tests for determining who should be treated as a "non-statutory insider."

Developing and applying those tests is a predominantly legal process, not a question of fact. Indeed, in the proceedings below, the relevant historical facts are not disputed. The bankruptcy court did not weigh any evidence to decide historical facts regarding the relationship of the individuals at issue, and, instead, selected five factors, and no others, as the relevant test for "insider" status under the Bankruptcy Code. Yet, despite the quasi-legal nature of this ruling, a split Ninth Circuit panel held that non-statutory insider status is a pure question of fact reviewed for clear error. One panel member dissented and called for *de novo* review in light of the mixed question requiring the application of law to fact. A majority of circuits that have decided the issue (the Third, Seventh, Tenth, and Eleventh) also disagree and apply *de novo* review for the same reasons.

This case presents a paradigm example of why *de novo* review should be required for determining insider status and why deferential review is improper. No material facts were in dispute, and the bankruptcy court announced its own test of relevant facts, a quasi-legal ruling establishing norms for deciding a legal status. As these norms may be used in other cases, they require meaningful appellate review. Appellate courts are much better situated to decide the norms that give meaning and limits to open-ended statutory determinations. For example, the Ninth Circuit refused to consider the bankruptcy court's legal finding that an admitted long-term romantic relationship is insufficient to support "non-statutory insider" status if it does not involve cohabitation, control, the purchase of expensive gifts, or the joint payment of bills or expenses.

Putting aside the seeming arbitrariness of requiring cohabitation when determining whether a purportedly commercial transaction between a girlfriend and a boyfriend is arm's length, the ruling is normative. It applies discrete values gleaned by the court to determine which facts are relevant and which ones are not. Under numerous precedents of this Court, this is quintessential legal analysis requiring *de novo* review.

The alternative outcome is untenable. If bankruptcy courts are allowed to develop their own tests for determining insider status, largely identical factual situations may be treated disparately. Non-statutory insider status is a *legal* status, but, under the Ninth Circuit's standard, its existence will depend on the particular views, values, and even caprice of the deciding judge. Similarly-situated individuals should be treated similarly, not inconsistently, regardless of whether the courtroom is located in Portland or in Reno. *De novo* review is necessary to ensure that insider status under the Bankruptcy Code is subject to a consistent standard.

B. Bankruptcy Filing, Pertinent Parties, and Key Principals.

The debtor and Respondent, The Village At Lakeridge, LLC ("Lakeridge"), owns and operates a commercial real estate complex in Reno, Nevada. Pet. App. 30a. Lakeridge is no stranger to the bankruptcy system, having previously filed a chapter 11 bankruptcy case in 2006 under the name of Magnolia Village, LLC, which culminated in a confirmed plan of reorganization. Bankr. Doc. 82 at 4-5.[1]

1. Unless otherwise noted, all citations to "Bankr. Doc." refer to the docket in the bankruptcy case below.

In June 2011, Lakeridge filed a second Chapter 11 bankruptcy case in the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court") to stop receivership proceedings initiated by Petitioner U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Trustee, as Successor by Merger to LaSalle Bank National Association, as Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 ("U.S. Bank") after Lakeridge defaulted on its loan obligations. *Id.* at 5, 9. U.S. Bank is the senior creditor, holding first priority liens on substantially all of Lakeridge's assets, including its real property and improvements located at 6900-6990 South McCarran Blvd. in Reno (the "Property"). *Id.* at 7-8; Bankr. Claim No. 1-2. At the time of the bankruptcy petition, Lakeridge owed $17.6 million to U.S. Bank, which held the debt as successor-in-interest to the original lender. Bankr. Doc. 246 at 2.

Lakeridge has only one member, another limited liability company ("LLC") named MBP Equity Partners 1, LLC ("MBP"). On its bankruptcy schedules, Lakeridge identified MBP as holding a general unsecured claim of $2,761,000.00 allegedly owed by Lakeridge to MBP (the "Insider Claim"). Pet. App. 30a-31a. Other than U.S. Bank's secured claim and the Insider Claim, there are no other creditors of the Lakeridge bankruptcy estate. Pet. App. 31a & n. 4.

Kathleen Skylar Bartlett ("Bartlett"), a member of MBP's five-member board of managers, served as Lakeridge's 30(b)(6) corporate designee and signed the

chapter 11 petition and all related documents on behalf of Lakeridge. J.A. 135-37; Pet. App. 30a-31a & n.5; Bankr. Doc. 82 at 5. Bartlett testified at her deposition that she was a "'representative of both [Lakeridge] and the equity owners'" and was an "'insider' of the debtor." Pet. App. 31a n.5. She admits to having a romantic relationship with Robert Alan Rabkin, M.D., ("Rabkin"), a retired former surgeon, during the events at issue. J.A. 142-43. Rabkin similarly admits to their ongoing romantic relationship. J.A. 128. The key facts regarding their relationship are undisputed.

C. Chapter 11 Plan, Disclosure Statement, and Assignment of the Insider Claim.

In September 2011, Lakeridge filed its Chapter 11 Plan of Reorganization (as amended, the "Plan") (Bankr. Docs. 48, 76, 109) and accompanying Disclosure Statement (as amended, the "Disclosure Statement") (Bankr. Docs. 47, 82). For purposes of this appeal, the Plan identified only two impaired classes of creditors: (a) U.S. Bank's secured claim (Class 1),[2] and (b) the Insider Claim (Class 3). Pet. App. 31a; Bankr. Doc. 82 at 10. The Plan contained the following proposal for these claims:

Class 1—Secured Claim of U.S. Bank: Lakeridge proposed to modify the note payable to U.S. Bank in the amount of the value of the Property with a ten-year term, a balloon payment at the end of the term, an interest rate

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2. The Plan also provided for U.S. Bank's unsecured deficiency claim as a separate Class 2 claim. This claim was removed when U.S. Bank elected to have its entire claim treated as secured pursuant to 11 U.S.C. § 1111(b). Bankr. Doc. 82 at 13-14.

of 4.25%, and amortizing payments based on a thirty-year term. The note would be secured by the Property, but interest would be capped by Lakeridge's "Monthly Net Income." In effect, the note negatively amortized even though U.S. Bank held the senior, secured position on the debt. Alternatively, the Plan provided that Lakeridge, in its sole discretion, could opt to provide U.S. Bank with U.S. Treasury Bonds worth a present value of $10,800,000 plus a stream of payments equal to the amount owing under U.S. Bank's loan documents that matured in 20 years from the effective date of the Plan. In exchange, the Plan required U.S. Bank to release its lien contrary to the requirements of 11 U.S.C. § 1111(b). Bankr. Doc. 82 at 11-13.

Class 3—Unsecured Claims: Lakeridge proposed to pay general unsecured creditors in Class 3 $30,000.00 on the Plan's effective date. Bankr. Doc. 109. MBP was Lakeridge's only general unsecured creditor. *Id.* at 14.

U.S. Bank objected to the Plan. Bankr. Doc. 222. As the only secured creditor, U.S. Bank opposed Lakeridge's proposal that U.S. Bank negatively amortize its debt for a new thirty-year period and reduce it to the value of the Property. *Id.* Because the Plan proposed to impair U.S. Bank's secured claim by reducing Lakeridge's debt to the value of the Property, this was a classic "cramdown" plan in bankruptcy parlance.[3] Pursuant to section 1129(b)(2)(A) of the Bankruptcy Code, a bankruptcy court may

3. This Court has addressed cramdown plans in several cases. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, __, 132 S. Ct. 2065, 2069 (2012); *Till v. SCS Credit Corp.*, 541 U.S. 465, 468-69 (2004) (Stevens, J., plurality opinion); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 955-57 (1997).

approve such a plan even where a class of secured claims is impaired and does not accept the proposed plan if the plan is fair and equitable and does not discriminate unfairly. Theoretically, the Insider Claim provided MBP with enough voting power pursuant to section 1129(a)(10) of the Bankruptcy Code to confirm the Plan over U.S. Bank's objection, but MBP's position as the sole member of Lakeridge made it a statutory "insider" under section 101(31) of the Bankruptcy Code, which disqualified its vote. *See* 11 U.S.C. § 1129(a)(10). Therefore, as Bartlett later acknowledged, unless a new creditor was found to replace MBP, the Plan was unconfirmable. J.A. 137, 145.

On October 27, 2011, shortly before a hearing scheduled for approval of the Disclosure Statement, MBP assigned the Insider Claim to Rabkin for $5,000. J.A. 61-63. The Notice of Assignment was filed by Lakeridge's counsel, not Rabkin. *Id.*

In November 2011, the Bankruptcy Court approved the Disclosure Statement. Bankr. Docs. 84, 96. At this hearing, U.S. Bank made a "section 1111(b) election" to treat its entire claim as fully secured. For plan confirmation purposes only, the parties stipulated that U.S. Bank would have an allowed secured claim of $17.6 million, Bankr. Doc. 246 at 2, and that the value of the Property as of the Plan confirmation hearing date was $10.8 million. Bankr. Doc. 108 at 1.

When the Plan was submitted to creditors for approval, U.S. Bank voted to reject the Plan and Rabkin voted to confirm it. J.A. 95-102. If allowed, Rabkin's sole vote was sufficient to confirm the Plan, as only a vote of one consenting impaired class was needed. *See* 11 U.S.C. § 1129(a)(10).

D. U.S. Bank's Motion to Designate Rabkin's Claim as an Insider Claim and to Disallow His Claim for Voting Purposes.

In July 2012, U.S. Bank filed a motion (the "Designation Motion") requesting that the Bankruptcy Court designate Rabkin's claim as an insider claim for purposes of section 1129(a)(10) and/or disallow the Insider Claim for voting purposes under section 1126(e) because, among other things, (a) Rabkin was a "statutory insider," having acquired the insider claim subject to the same limitations possessed by the assignor, MBP, who was a statutory insider; (b) Rabkin was a "non-statutory insider" because the overwhelming evidence demonstrated that Rabkin's purchase of the Insider Claim and subsequent vote were not at arm's length; and (c) the assignment and subsequent vote were not made in good faith. J.A. 64-82.

The Bankruptcy Court held an evidentiary hearing on the Designation Motion on August 1, 2012 (the "Designation Hearing"). At the Designation Hearing, the parties presented the following uncontroverted testimony and evidence concerning Rabkin's relationship with Bartlett and his acquisition of the Insider Claim:

> Rabkin and Bartlett were romantically involved at the time Rabkin purchased the Insider Claim from MBP and had remained romantically involved as of the evidentiary hearing, one year later. J.A. 127-28, 142-43.
>
> Rabkin met Bartlett approximately two years before the Designation Hearing when Bartlett served as his real estate agent. J.A. 107, 142.

Although Rabkin and Bartlett did not live together, they were close romantic friends, dated, socialized, had dinner together, saw each other regularly, and even discussed Rabkin's deposition in June 2012. J.A. 121, 127-28, 142-44.

Rabkin and Bartlett did not purchase expensive gifts for one another, did not share checking accounts or other property, and did not make loans to one another. J.A. 133-34, 143-44.

MBP was aware that, due to its statutory insider status, it could not vote its claim to confirm the Plan, but that, if it sold the Insider Claim to a third party, that party might be able to vote the claim. J.A. 137, 144-45.

Bartlett approached Rabkin on behalf of MBP and proposed to sell Rabkin the Insider Claim for $5,000. J.A. 107-08, 146-47.

MBP did not offer or market the Insider Claim to anybody other than Rabkin. Bartlett claimed that MBP chose Rabkin because "he was around. He was in town. And he seemed like the most viable candidate at the time." J.A. 146.

The Notice of Assignment was filed by Lakeridge's counsel, not Rabkin. J.A. 61-63.

Rabkin did not perform any due diligence or investigation regarding the Debtor prior to purchasing the Insider Claim. J.A. 108-09,

123-27. Rabkin's only information regarding Lakeridge prior to purchasing the Insider Claim was obtained from Bartlett and possibly reviewing the rent roll and physically viewing the Property. J.A. 108-09, 123-25.

Rabkin had not previously purchased a claim in bankruptcy and had no familiarity with this type of investment prior to purchasing the Insider Claim. J.A. 127.

Lakeridge did not provide Rabkin with copies of the bankruptcy schedules or any other documents prior to Rabkin's purchase of the Insider Claim, nor did Rabkin request or receive the bankruptcy pleadings or any other documents before or after he purchased the Insider Claim. J.A. 128-29.

The first time Rabkin reviewed any bankruptcy pleadings, including the Plan, was in connection with his deposition. J.A. 111, 128-29.

At the time Rabkin purchased the Insider Claim, Rabkin had no information regarding the potential or likely recovery. J.A. 125. Rabkin did not even review the Plan prior to purchasing the Insider Claim. J.A. 111.

Rabkin testified that he purchased the Insider Claim solely for "investment" purposes and that he believed "there was an opportunity to have a return on [his] investment," but he was aware that he might not receive any return on the

> investment. J.A. 110-111, 123, 133. Nevertheless, even though he had paid only $5,000 for the Insider Claim, J.A. 62-63, and even though the maximum he could be paid under the Plan for his $5,000 "investment" was $30,000, Bankr. Doc. 109, Rabkin rejected an initial offer by U.S. Bank to purchase the Insider Claim for $50,000 and then a second offer to purchase it for $60,000 (a 1,200% return). J.A. 117, 121, 130-31. Rabkin characterized the latter offer as being "for a substantial amount of money." J.A. 117.

None of the above facts is disputed, and none is controverted by any other evidence.

E. The Bankruptcy Court's Order Granting the Designation Motion in Part and Denying It in Part.

At the conclusion of the hearing, the Bankruptcy Court orally granted the Designation Motion in part, ruling that Rabkin's vote could not be considered to determine acceptance of the Plan under 11 U.S.C. § 1129(a)(10) because Rabkin had assumed MBP's insider status when he acquired the Insider Claim. Accordingly, the Bankruptcy Court entered an order holding, among other things, that the Plan was unconfirmable because Lakeridge did not have the consenting, impaired class necessary to confirm the Plan (the "Designation Order"). Pet. App. 68a. In making its ruling, the Bankruptcy Court applied the general law of assignment to preclude an assignee of an insider claim from voting to confirm a plan. *Id.* at 67a-68a. Based on this finding, the Bankruptcy Court denied plan confirmation. *Id.* at 68a.

The Bankruptcy Court also found that Rabkin was not a non-statutory insider. It did not articulate what legal standard or test it had chosen to apply to the facts. Instead, the court concluded that Rabkin was not a non-statutory insider because Rabkin did not: (i) exercise control over Lakeridge and was not controlled by Bartlett; (ii) cohabitate with Bartlett or pay her bills and expenses of Bartlett (nor did Bartlett pay his bills or expenses); or (iii) purchase expensive gifts for Bartlett or receive expensive gifts from her. *See* Pet. App. 66a. The Bankruptcy Court explained that it had identified these characteristics based upon its own review of "insider" cases:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it. I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-54. The court did not address in its ruling the fact that Rabkin and Bartlett had admitted to what apparently was a boyfriend/girlfriend romantic relationship at the time of the assignment. Finally, the court rejected U.S. Bank's contention that the assignment to Rabkin and Rabkin's subsequent vote were not made in good faith. Pet. App. 67a.

U.S. Bank prevailed, however, in its request to exclude Rabkin's vote, as the Bankruptcy Court ruled that MBP's assignment to Rabkin transferred MBP's insider status to him. Pet. App. at 67a-68a. Once the court classified Rabkin's vote as the vote of an insider, Lakeridge lacked the requisite approval of a non-insider class of consenting creditors necessary for cramdown.

F. Appeals.

Lakeridge appealed the Designation Order, asserting that the Bankruptcy Court had erred by denying Plan confirmation on the basis that Rabkin had acquired statutory insider status by purchasing the Insider Claim. U.S. Bank cross-appealed from the portion of the Designation Order that had concluded that Rabkin was not a non-statutory insider for purposes of Section 1129(a)(10). *Id.* U.S. Bank also appealed the Bankruptcy Court's ruling finding no bad faith in the assignment to Rabkin or in Rabkin's vote to approve the Plan. J.A. 28-29, 51-52; Pet. App. 36a.

On April 5, 2013, the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals (the "BAP") reversed the Bankruptcy Court's holding that Rabkin's vote could not be considered to determine acceptance of the Plan, and affirmed the other rulings, including the conclusion that Rabkin was not a non-statutory insider. Pet. App. 28a-60a. On April 19, 2013, U.S. Bank appealed to the Ninth Circuit. J.A. 1-2, 34.

On February 8, 2016, the Ninth Circuit issued a published, divided decision affirming the BAP decision. Pet. App. 1a-27a. In a separate, unpublished decision

issued the same day, the Ninth Circuit affirmed the Bankruptcy Court's rulings that the Insider Claim was neither assigned to Rabkin nor voted in bad faith. J.A. 157-60.

In the published decision, the Ninth Circuit unanimously held that a vote cast by a third-party assignee of an insider claim could be counted for purposes of confirming a cramdown plan even though the claim could not have been counted had the vote been cast by the original claimant. Pet. App. 10a-13a, 18a. The general law of assignment did not apply to the sale of insider claims because (a) insider status is not a "property of a claim," and (b) a person's insider status is "a question of fact that must be determined after the claim transfer occurs." Pet. App. 10a-13a.

In a 2-1 split decision, Judges Smith and Lasnik (the "Panel majority") elected to apply a clearly erroneous standard of review for determining whether Rabkin was a non-statutory insider and deferred to the Bankruptcy Court's determination of Rabkin's non-statutory insider status as a "factual" finding. Pet. App. 14a-15a & n.13, 16a-18a. Specifically, the Panel majority stated that, while it reviewed *de novo* the Bankruptcy Court's definition of non-statutory insider status, it "analyze[d] whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review." Pet. App. 15a n.13. But the Panel majority suggested that its conclusion might have been different had it weighed the evidence differently. *Id.* at 15a-16a & n.14.

In dissent, Judge Clifton argued that the Panel majority (a) improperly applied a clearly erroneous standard of review rather than the *de novo* standard of review applied by other circuits, and (b) failed to apply the arm's length test for determining non-statutory insider status as adopted by other circuits. Pet. App. 19a-27a. He noted that:

> The majority opinion states three separate times . . . that we cannot reverse under the clear error standard simply because we would have decided the case differently, a telling sign that even the majority recognizes that support for the finding is thin at best . . . . But my dissent is based on far more than a mere alternative view of the evidence. I cannot fathom how anyone could reasonably conclude that this transaction was conducted as if Rabkin and Bartlett were strangers.

Pet. App. 24a-25a.

On March 27, 2017, this Court granted certiorari to decide whether the Ninth Circuit erred in applying a clearly erroneous standard of review to the determination of non-statutory insider status. J.A. 161.

SUMMARY OF ARGUMENT

1. The determination of non-statutory insider status is a mixed question of law and fact.

a. The Bankruptcy Code's definition of "insider" is open-ended, providing enumerated examples

of who is an insider but no standards to apply to other situations. *See* 11 U.S.C. § 101(31). According to the legislative history, the term was intended to apply to individuals and entities with such a close relationship to the debtor (such as control) that their transactions were not at arm's length. The circuit courts have applied this broad standard as their test for who is an insider, leaving it to the bankruptcy courts to determine specific relevant factors.

b. In the proceedings below, the Bankruptcy Court selected five factors to determine whether the relationship at issue was sufficiently "close." No standard was applied for determining whether the transaction was "arm's length." The Bankruptcy Court did not determine any historical facts, as the relevant facts were all undisputed. Instead, the Bankruptcy Court filled the gap in the open-ended statutory definition by establishing its own norms and applying them to the undisputed facts. This analysis is substantially legal or quasi-legal and presents a classic mixed question of law and fact, as four circuits have found. *See, e.g., In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011); *Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 394-95 (3d Cir. 2009).

2. This mixed question of law and fact requires *de novo* appellate review.

a. This Court has used four different tests to determine the proper standard for reviewing mixed questions of law and fact. Under each test, the standard of review for determining non-statutory insider status should be *de novo*.

(i) *Predominance of law or fact.* Where a mixed issue is predominantly legal, the standard of review is *de novo*. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985). Because the question here is whether the Bankruptcy Court "applied the proper standard to essentially undisputed facts," *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), the issue is predominantly legal and subject to *de novo* review. This Court's maritime cases applying the Jones Act are analogous, requiring *de novo* review of trial court determinations of what it means to be a "seaman." *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-72 (1995).

(ii) *Historical practice.* The Court's next test, "the 'history of appellate practice,'" *McLane Co. v. E.E.O.C.*, — U.S. —, 137 S. Ct. 1159, 1166 (2017) (citation omitted), further supports *de novo* review. Not only is *de novo* review the majority rule among those circuits to consider the standard of review for determining insider status, but it also comports with the circuit courts' longstanding practice regarding other mixed questions of bankruptcy law and fact. *See, e.g., First Nat'l Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689 (10th Cir. 2014) (applying *de novo* review to a determination of whether debt for principal residence had "arisen out of" a "farming operation").

(iii) *Functional considerations.* A third test considers whether the trial court or the appellate court is best equipped to decide the issue. Here, numerous factors favor *de novo* review: the lack of factual disputes and credibility issues; the need for uniform standards and consistent outcomes as to who is an "insider"; and the value-based norms that courts must develop to apply the Bankruptcy Code, which are fundamentally legal in

nature. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 695-98 (1996). Appellate courts, not trial courts, should have ultimate responsibility for deciding the applicable test for determining insider status.

(iv) *Ultimate issue.* The determination of insider status resolves the ultimate issue in this case and "'clearly impl[ies] the application of standards of law.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982) (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)). Because the issue here necessarily implicates legal standards, *de novo* review should be required. *See id.*

b. Insider status is too important an issue under the Bankruptcy Code to be subject to disparate rulings and tests that vary according to the predilections of individual bankruptcy court judges. It requires an objective test that results in consistent outcomes so parties know the rules in advance of entering into these transactions. As the issue satisfies each of this Court's tests, the standard of review for determining non-statutory insider status should be *de novo*.

ARGUMENT

I. The Question of Who Is a Non-Statutory Insider under the Bankruptcy Code Is a Mixed Question of Law and Fact.

A. The Statutory Framework and the Bankruptcy Court's Decision.

The ultimate question in this case—how appellate courts should review a bankruptcy court's decision as to whether an individual is a "non-statutory" insider under the Bankruptcy Code—addresses, to some degree, an

issue of statutory construction. No fixed definition of "insider" is set forth in the Bankruptcy Code.

The debtor, Lakeridge, is an LLC with only one member, MBP, itself an LLC managed by a board of five members. Bartlett is one of MBP's board members and an insider. Pet. App. 31a & n. 5. For assessing whether Rabkin should also be treated as an insider, the Bankruptcy Code provides the following guidance:

(31) The term "insider" includes—

***

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

> (ii) relative of a general partner in, general partner of, or person in control of the debtor;
>
> (iii) partnership in which the debtor is a general partner;
>
> (iv) general partner of the debtor; or
>
> (v) person in control of the debtor;
>
> ***

11 U.S.C. § 101(31). The enumerated categories of section 101(31) are considered insiders per se.

These enumerated categories are illustrative and not exhaustive or limiting. *See id.* at § 102(3) ("'includes' and 'including' are not limiting"). Therefore, insiders may be found in numerous other circumstances beyond the enumerated categories. These are commonly known as "non-statutory insiders." *See* Pet. App. 9a (explaining the difference between statutory and non-statutory insiders).

Although the Bankruptcy Code fails to define an insider beyond the enumerated examples, the legislative history provides a widely cited discussion of the general concept: "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms [*sic*] length with the debtor." S. REP. No. 95-989 at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; H.R. REP. No. 95-595 at 312 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. "Non-statutory insider" thus is a catch-all category for creditors who are comparable to the enumerated

examples of "statutory insiders." Pet. App. 13a, 16a-17a. The term "non-statutory insider" actually is a bit of a misnomer, as it addresses which creditors beyond the enumerated examples nonetheless constitute "insiders" under section 101(31). As a result, the determination of who is a non-statutory insider itself necessarily involves a question of statutory interpretation as applied to certain facts, and thus, it inherently has a fundamentally legal complexion. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) (requiring *de novo* review of trial court's determination of whether maritime employee is a "seaman" under the Jones Act: "Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard.").

The circuit courts of appeal have formulated various general standards to determine when creditors would otherwise be considered insiders. Most agree, however, that the question involves a determination of whether the creditor's relationship to the debtor is close enough to command preferential treatment and thereby hold an advantage over other creditors, resulting in a transaction that is not negotiated at arm's length. *See, e.g.*, Pet. App. 13a-14a (Ninth Circuit's ruling that a creditor is a non-statutory insider when "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length") (citation omitted); *In re Kunz*, 489 F.3d 1072, 1078-79 (10th Cir. 2007) (discussing tests for determining closeness of relationship). This "standard" provides only general guidance. It does not say which factors are relevant to determining "closeness" or "arm's length," nor does it specify a particular quantum of "closeness" that must be

reached. The question, therefore, is whether bankruptcy courts should be accorded virtually plenary discretion to determine the specific tests to apply when analyzing the facts.

In its decision below, the Bankruptcy Court concluded that Rabkin was not an insider by determining for itself which relevant facts would determine the outcome. *See* J.A. 153-54; Pet. App. 66a. Reviewing decisions by other courts, it (a) found five factors commonly present in other courts' determinations that a creditor was an insider, and then (b) ruled that none of these five factors applied to Rabkin. *See id.* The issue before this Court does not address the second question, whether the historical facts of the case satisfy the five factors identified by the Bankruptcy Court from its canvass of cases, but rather the first question, whether the Bankruptcy Court's selection of these five factors alone is a correct interpretation of the statute. In other words, is a trial court's determination of *how* to decide whether a creditor is a non-statutory insider reviewed *de novo* or for clear error?

B. The Bankruptcy Court Decided More than a Pure Factual Issue.

Standard-of-review questions generally fall into three categories: issues of fact subject to clearly erroneous review; issues of law subject to *de novo* review, and mixed issues of law and fact, which are subject to considerable debate over which of the two standards of review should apply. Here, the Bankruptcy Court's methodology for deciding how it should decide whether Rabkin is a non-statutory insider is either a mixed question of law and fact or a pure question of law, but definitely not a pure question

of fact subject to the minimal, highly deferential review as the Panel majority held. *See* Pet. App. 8a, 11a, 15a n.13.

1. Insider Status Is Not a Historical Fact.

The determination of what factors a bankruptcy court should weigh in deciding whether a creditor is a non-statutory insider is not a question of historical fact. Historical facts involve questions that are answered or proved "at least to some significant degree of probability, by inferences from evidence." HARRY T. EDWARDS, ET AL., FEDERAL STANDARDS OF REVIEW 7 (2d ed. 2013). They do not require judicial determination of broad, generalized governing principles and instead apply laymen's "logic and human experience to the received physical, documentary, and testimonial evidence." *Id.*; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (factual findings "respond to inquiries about who, when, what, and where"). Because the question here involves "'whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated,'" the issue is not strictly factual and therefore, at minimum, "is a mixed question of law and fact." *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (brackets in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). Indeed, the most critical facts at issue below are undisputed.

The Bankruptcy Court did not apply a specific legal standard, but, rather, wove together a five-factor test of what it perceived to be the key characteristics of insiders in other cases decided by other courts. It stated:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it.
>
> I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-54. This is a paradigm example of a mixed question of law and fact:

> When, however, a controlling law is defined pursuant to abstract legal norms or principles, trial-level decision making necessarily involves more than a neat comparison of fact to law. It requires, instead, a nuanced assessment of characterization of the historical facts in light of the governing legal norms. In other words, when a legal principle is only abstractly defined, it serves not as a standard against which the historical facts can be measured, but rather as something more akin to a general guide for the exercise of considered judgment. The conclusions resulting from the exercise of this sort of judgment are referred to as "mixed finding[s] of law and fact[.]"

EDWARDS, ET AL., *supra*, at 8 (citation omitted). As this Court has explained in its classic formulation, mixed questions are those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S. at 289 n.19. Such is the exact situation here. Because the historical facts were undisputed, the Bankruptcy Court was required to engage in legal analysis to apply the Ninth Circuit's definition of a non-statutory insider (a close relationship comparable to the enumerated examples and the absence of an arm's-length transaction) to the undisputed facts.

The Bankruptcy Court, however, did much more than apply a legal principle to established facts. It made a legal or quasi-legal ruling as to which factors must be considered in deciding non-statutory insider status and, implicitly, decided that other factors are not material. *See* J.A. 153-54; Pet. App. 66a. For example, the court found that the existence or lack of cohabitation as highly pertinent to the statutory question, yet it gave no weight to the existence of an intimate romantic relationship without cohabitation. The court's selection of relevant factors based on circumstances *in other cases* (none of which was cited by the court) is a quintessential legal judgment, not a factual determination based on considerations unique to that particular case.

The Bankruptcy Court made judgments about how "close" a relationship must be to reach insider status. Again, this is an exercise in standard-making, a determination of quantum that is just as relevant to deciding the issue

as is a determination of the relevant factors. If one court decides that an enduring close platonic friendship is just as significant as a romantic relationship, and another court decides that it is not, and if that is the lone distinction between the cases, the disparity in outcome would result from inconsistent standards, not inconsistent facts. These questions are treated as issues of law precisely to avoid such untenable inconsistencies in outcome.

The skimpy nature of the five factors selected by the Bankruptcy Court reinforces the legal nature of its ruling. Given the Ninth Circuit's amorphous definition of an insider (close relationship and the lack of an arm's length transaction), the five factors hardly are sufficient. The cohabitation factor, for example, is far more arbitrary than logical—surely, the closeness of the individual's personal relationship to the debtor should matter at least as much as whether they share the same roof. By selecting these factors as pertinent and excluding others, the court effectively created its own minimalist test, one that it or other courts could and presumably would apply in future cases.

This judicial determination of relevance is a quintessential legal conclusion. *See United States v. Gaudin*, 515 U.S. 506, 520-21 (1995) (distinguishing between materiality or relevance as ground for excluding evidence from trial, a legal issue for the court and not a factual question for the jury, and materiality as an element of a criminal offense, which is principally factual and thus decided by the jury and not the court). No deference should be owed to a judicial decision that applies the broad tests of "closeness" and "arm's length transaction" in such a narrow and restrictive manner that broad swaths of

seemingly pertinent facts are *categorically* excluded from consideration solely because they supposedly do not match up with some of the facts found in other cases reviewed by the Bankruptcy Court.

As Judge Clifton remarked, the Bankruptcy Court did not apply any test for determining whether the transaction was at arm's length as required by the Ninth Circuit. Pet. App. 24a. As a result, numerous highly relevant facts were ignored by the Bankruptcy Court without any apparent reason.[4] Without a test, the analysis is subject to the

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4. A host of undisputed facts were never considered by the Bankruptcy Court even though their potential relevance towards its determination of whether the transaction was arm's length would appear obvious:

- Rabkin's and Bartlett's close romantic and business relationship, J.A. 127-28, 142-43;
- MBP's failure to shop the Insider Claim to anybody other than Rabkin, J.A. 146;
- Lakeridge's failure to serve Rabkin with any bankruptcy papers, J.A. 129;
- Rabkin's lack of knowledge about the bankruptcy case or the proposed treatment of the insider claim under the plan, J.A. 125, 129;
- Rabkin's failure to review other relevant documents including the notice of assignment of claim, the disclosure statement, the plan, or bankruptcy schedules, J.A. 129;
- Rabkin's lack of due diligence, J.A. 108-09, 123-27;
- The tremendous disparity between the consideration and the potential value of the claim, J.A. 62; and

vagaries of a bankruptcy court's own views, which would inevitably lead to disparate results.

All of these consequences reflect the same core truth. Because the legal definition of a non-statutory insider is so vague and amorphous, the bankruptcy courts must develop their own standards for determining *how* to decide when a creditor is or is not a non-statutory insider, i.e., *how* to consider the facts. Those decisions are not determinations of historical fact.

2. Insider Status Is a Mixed Question of Law and Fact.

The Panel majority devotes scant attention, if that, to the pivotal threshold question of whether the issue is factual, legal, or mixed. Its standard of review discussion is cursory, with no substantive analysis, and reduces the issues to a binary question of determining the statutory definition (which is legal and reviewed *de novo*), *see* Pet. App. 8a ("Establishing the definition of non-statutory insider status is likewise a purely legal inquiry."), and deciding whether the creditor qualifies under that definition (which is factual and reviewed for clear error), *see id.* ("Whether a specific person qualifies as a non-statutory insider is a question of fact."). The Panel majority says nothing about which standard would be applied if the issue was a mixed question of law and fact.

• Rabkin's refusal to sell his claim for twice as much as provided under the Plan. J.A. 117, 121. (Elsewhere, the Bankruptcy Court did address this fact, but only in the context of determining that no bad faith had occurred. Pet. App. 67a.)

Instead, in response to Judge Clifton's dissenting view that the issue is either legal or a mixed question of law and fact, both subject to *de novo* review, the Panel majority merely refers back to the same conclusory statement above:

> The dissent argues that "Rabkin's status [is] a mixed question of law and fact, subject to de novo review." [Pet. App. 24a]. Stating that an issue is a "mixed question" is simply the dissent's backdoor to reassessing the facts. As stated in Section II, we have two distinct issues in question, each with a different standard of review. First, we reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question. Now, we must analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review.

Pet. App. 15a n.13. This circular, self-referential explanation adds nothing to the conclusory discussion above.

The dissenting opinion, by contrast, provides a lengthy discussion of why the issues at a minimum are mixed questions of law and fact. As it sums up the issue:

> [T]he problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied. What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because

> the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review.

Pet. App. 24a (citation omitted); *see also id.* at 23a (stating that the Bankruptcy Court's ruling "turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts"). These comments echo the typical circumstances when mixed questions are present: "Legal principles that result in . . . mixed questions on appeal are generally broad, often fluid, sometimes common sense concepts that cannot be 'reduced to a neat set of legal rules.'" EDWARDS, ET AL., *supra*, at 12 (quoting *Ornelas*, 517 U.S. at 695-96). Notably, the dissent points out that the Bankruptcy Court's list of five factors is badly flawed because it does not address whether the transaction was arm's length or whether Rabkin and Bartlett were unrelated or "dealt with each other as strangers," as required under the Ninth Circuit's general standard. Pet. App. 13a-14a n.11. These errors are fundamentally legal in nature.

A majority of the other circuit courts to address the issue (the Third, Seventh, Tenth, and Eleventh Circuits) agree with the dissent that insider status is a mixed question of law and fact. *See In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011) ("The question of insider status is regarded as a mixed question of law and fact."); *Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 394-95 (3d Cir. 2009) (concluding that insider status "is best characterized as a mixed question of law and fact" requiring "'plenary review of the lower court's interpretation and application of those facts to legal precepts'") (citation omitted); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272,

1275 (10th Cir. 2008) ("we have a mixed question of law and fact where the legal analysis predominates"); *Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005) (unpublished) (agreeing that "'[t]he question . . . whether the historical facts found by the bankruptcy court meet the [Bankruptcy] Code's open-ended definition of an insider . . . is properly characterized as a mixed question of law and fact'") (quoting *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996)). The Fourth and Fifth Circuits have applied a clearly erroneous standard of review, treating the issue as purely one of fact, though their precedential import is subject to debate. *See Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1466 (5th Cir. 1991); *Koch v. Rogers (In re Broumas)*, 135 F.3d 769 (table), 1998 WL 77842, at *8 (4th Cir. Feb. 24, 1998) (unpublished); *but see Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1014 (5th Cir. 1992) (stating, in the closely related context of a state-law fraudulent transfer claim, that "it would appear to us that once the underlying facts are resolved, insider status ultimately is [a] question of law," but not deciding the issue).[5]

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5. The circuit split on the standard of review does not turn on the particular substantive standard regarding insider status applied by the respective courts. If anything, the substantive standards used in the two circuit cases applying deferential review are *more* amorphous and rudderless as legal tests than the Ninth Circuit's standard. *See Fabricators*, 926 F.2d at 1465 ("control is a sufficient basis for insider status; a formal relationship, *e.g.*, officer, director or shareholder, may be persuasive but is not a necessary factor"); *Broumas*, 1998 WL 77842, at *7 ("an insider may be any person or entity whose relationship with the debtor is sufficiently close so as to subject the relationship to careful scrutiny") (internal quotation marks and citations omitted).

Because the Bankruptcy Court established its own test for deciding non-statutory insider status, based upon its review of other cases, the decision is fundamentally legal in nature. *See* EDWARDS, ET AL., *supra*, at 7 ("Laws . . . are the governing principles pursuant to which a judge or jury determines the relevance and significance of historical facts, resolves subsidiary issues, and reaches the ultimate judgment in a case."). The Bankruptcy Court's decision has clear earmarks of a legal ruling: it establishes norms that subsequent decisions may use and apply, and it does so in order to construe an open-ended statute. The bedrock rule that questions of law are reviewed *de novo* is not in dispute. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration."); Pet. App. 8a.

The majority of circuit courts that deem non-statutory insider status to be a mixed question apply *de novo* review, recognizing that the issue is significantly legal in nature in light of the large gap between the vague statutory definition and the actual analysis that a bankruptcy court must apply to decide insider status. *See Winstar*, 554 F.3d at 395 (explaining that mixed questions arise where "the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts against the backdrop of a statute" and thus "exercis[ing] plenary review of the lower court's interpretation and application of those facts to legal precepts") (internal quotation marks and citation omitted); *U.S. Med.*, 531 F.3d at 1275 ("Here, however, the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts against the backdrop of a statute; thus, we have a mixed question of law and fact where the legal analysis predominates."); *accord Longview*, 657 F.3d at 509; *Florida Fund*, 144 Fed. Appx.

at 74; *cf. Holloway*, 955 F.2d at 1010 (reversing district court's denial of insider status under Texas fraudulent transfer statute).

This predominant historical pattern among the courts of appeals is significant. *See McLane Co. v. E.E.O.C.*, — U.S. —, 137 S. Ct. 1159, 1166-68 (2017) (holding that "the longstanding practice of the courts of appeals" regarding an appellate standard of review question, *i.e.*, "the 'long history of appellate practice' here . . . carries significant persuasive weight") (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). As discussed below, these majority holdings reflect this Court's many precedents regarding the standard of review for mixed questions. Where the issue under review has a significant legal complexion or has potential broader impact than the individual case at hand, *de novo* review is required to ensure consistency of decision, uniformity of legal standards, and sound policy.

II. Mixed Questions Such As Determinations of Insider Status Should Be Reviewed *De Novo* Because They Involve Much More Than a "Neat Comparison of Fact to Law."

A. Questions Applying a Particular Standard, Establishing Norms, Determining Broadly Applicable Policy, or Deciding Ultimate Issues, Are Legal in Nature and Thus Require *De Novo* Review.

If a determination of insider status required nothing more than a "neat comparison of fact to law," EDWARDS, ET AL., *supra*, at 8, the clearly erroneous standard would, and should, apply, because such factual determinations are best made by the factfinder. But the statute and

the tests developed by the appellate courts ask the bankruptcy courts to do much more than that. Due to the statute's ambiguity and the appellate court's very general standard, bankruptcy courts are left to develop their own tests for determining what factors render a relationship comparably close to the enumerated examples in the statute, and whether the transaction was arm's length. These questions are answered not by the facts of the individual case but by reference to the objectives and examples in the statute; in other words, a legal analysis that can be applied to multiple disputes "and not simply to the one *sub judice*." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 n.3 (1986). In no measure can they be reduced to a "neat comparison of fact to law."

The problem is illustrated perfectly by the events in this case. In its decision, the Bankruptcy Court identified the five factors that it believed to be material, based on its asserted review of unidentified cases. These factors were faulty and incomplete on their face (*e.g.*, dismissing a romantic relationship without explanation, and never addressing whether, or why, the transaction was deemed to be arm's length), yet the Ninth Circuit gave U.S. Bank no recourse for meaningful appellate review. If a clearly erroneous standard applies, bankruptcy courts would have plenary authority to develop their own unique legal tests, which would eventually result in inconsistent outcomes as to a legal status that should be consistently recognized from one courtroom to the next.

Neither the Ninth Circuit's Panel majority nor the two other circuit court decisions applying deferential review explain why the question of insider status is purely factual and reviewed for clear error only. They simply assume, almost reflexively, that the issue is factual and thus warrants deferential review for clear error as a matter of course. *See* Pet. App. 8a, 15a n.13; *Fabricators*, 926 F.2d at 1466; *Broumas*, 1998 WL 77842, at *8. This conclusory approach provides no guidance. The decisions certainly do not address the question presented here, whether insider status should be reviewed deferentially on appeal for clear error even though it presents a mixed question of law and fact. And they make absolutely no effort to ground their decision in any of this Court's precedents addressing the appropriate standard of review for statutory questions like insider status. Those precedents make clear that, where the predominant inquiry is legal and not factual (such as determining whether the trial court applied the correct legal standard, as is the case here); or where the trial court is required to develop its own quasi-legal norms to fill gaps in a vague statute (also the case here); or where consistency of decision-making or the need for appellate oversight is an important objective (definitely the case here); or even where the court is resolving the ultimate issue in the case (as here), *de novo* appellate review is required.

This Court has developed multiple tests for deciding the standard of review for mixed questions of law and fact. Applying these tests here leads to only one conclusion: appellate courts should review decisions determining non-statutory insider status *de novo*.

1. The Predominance of Law or Fact Test.

Though this Court has repeatedly acknowledged the difficulty in crafting a single test for deciding standard of review questions, it has never doubted that mixed questions that are predominantly legal in nature should be reviewed *de novo*, as if they were pure issues of law, and those that are predominantly factual are reviewed for clear error. *Compare Miller v. Fenton*, 474 U.S. 104, 114 (1985) (explaining that where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law"), *with Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960) (pointing to the "nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each" to warrant deferential review). The question often devolves to a simple matter of determining whether the legal question "is analytically more akin to a fact or a legal conclusion." *Miller*, 474 U.S. at 116. As summarized by an oft-quoted Ninth Circuit en banc decision:

> If application of the rule of law to the facts requires an inquiry that is "essentially factual"—one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct"—the concerns of judicial administration will favor the district court, and the district court's determination

> should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc) (quoting *Pullman-Standard*, 456 U.S. at 288; *Duberstein*, 363 U.S. at 289), *abrogation on other grounds recognized in Estate of Merchant v. Comm'r*, 947 F.2d 1390 (9th Cir. 1991); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984) ("At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."); Monaghan, *supra*, at 233 (describing law and fact distinctions as "having a nodal quality; they are points of rest and relative stability on a continuum of experience").

Matters falling closer to the middle of the spectrum more often than not are reviewed *de novo*. *See, e.g.*, *Pullman-Standard*, 456 U.S. at 289 n.19 ("there is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court"); *United States v. Brown*, 631 F.3d 638, 643 (3d Cir. 2011) ("This [law-fact] calculus will generally favor de novo

review, 'because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.'") (quoting *McConney*, 728 F.2d at 1202). Thus, where the statutory standard is not well-developed, and further legal extrapolation by the trial court is required to be able to apply the statute to the facts, *de novo* review typically is required.

Similarly, an appeal like this one that raises the question of whether the trial court "applied the proper standard to essentially undisputed facts" is considered predominantly legal and subject to *de novo* review. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In *Parke, Davis*, this Court rejected an argument that a district court's error in refusing to consider non-contractual sources of illegal combinations in violation of the Sherman Act was reviewable only for clear error because the error went to the standard applied by the court in deciding how to weigh the facts, which was incorrect in light of recent Supreme Court precedent. *See id.* at 44-46 (citing six prior decisions of this Court reviewing such issues as questions of law); *accord United States v. Gen. Motors Corp.*, 384 U.S. 127, 141-43 & n.16 (1966) ("As in *Parke Davis*, *supra*, the question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of this case"); *cf. Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) (applying *de novo* review to determination of ultimate fact based on historical and circumstantial facts); *Bogardus v. Comm'r*, 302 U.S. 34, 38-39 (1937) (same).

Perhaps the best example of this Court's requirement of *de novo* review for decisions by trial courts that are

necessarily normative—*i.e.*, they require the court to develop and apply either explicit or implicit norms to fill a large gap between a vague legal standard and historical facts—arises in questions involving a legal status. Where trial courts must determine the norms that govern whether a party satisfies a particular legal status, such a question is primarily legal in nature and requires *de novo* review. *See, e.g., Miller*, 474 U.S. at 116 (concluding that the fact that the inquiry "subsum[es], as it does, a 'complex of values' . . . itself militates against treating the question as one of simple historical fact") (internal citation omitted).

A series of maritime cases illustrate this principle. This Court has repeatedly held that, determining whether a plaintiff is a "member of a crew" and thus a "seaman" under the Jones Act (which does not specifically define these terms) is a mixed question of law and fact, whereby it is for the courts "to define the statutory standard" as "[m]ember of a crew' and 'seaman' are statutory terms; their interpretation is a question of law." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). Only when the standard is fully developed by the courts do the factual aspects of whether the party is a member of a crew and thus a seaman become issues of fact. *See id.* This Court therefore held that, even though the jury decides the question of whether the plaintiff was a seaman, the trial court must decide, as a matter of law, whether the term "seaman" applied to employment connected with a vessel in navigation. *Id.* at 355. By contrast, where issues of fact remained open after the legal standard had been resolved, the issue is not decided as a matter of law. *See Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 87-88 (1991); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-14 (1986) (distinguishing between ultimate fact and legal standard

regarding Jones Act definition, which is decided *de novo*, and historical facts about "how the respondents spent their time working on board," which is challenged for clear error). Several years later, this Court addressed the issue again as a matter of law and distinguished between land-based and sea-based maritime workers, requiring the latter to have a substantial connection with a vessel in navigation, so that stevedores subject to the Longshore and Harbor Workers' Compensation Act could not be considered seamen under the Jones Act. *See Chandris*, 515 U.S. at 355-72.

The parallels between the statutory schemes in "seaman" cases and the "insider" provisions of the Bankruptcy Code are clear. Both schemes involve a key legal status that determines important rights under their respective statutes. In both cases, the statutory categorization is not defined in the statute. And, in both cases, the lack of specificity has required multiple iterations of judicial clarification and standard-making. If anything, the circumstances here lean more to the "law" side of the equation as the circuit courts have compounded the problem by setting forth extremely generalized standards (*i.e.*, "control," "arm's length transaction," "close relationship") that leave to bankruptcy courts the task of making the type of value judgments about the concept of an "insider" that should *not* be decided on a case-by-case basis. This Court, therefore, should follow the same bright-line approach that it used in the maritime cases, where it deemed all issues relating to the standards for determining who is a "seaman," *i.e.*, anything constituting a norm, to be treated as predominantly legal and thus reviewed *de novo*, and treating the remaining historical fact questions as factual and reviewed deferentially. The

maritime precedents are highly relevant to the analysis here, and, perhaps more importantly, their bright-line approach appears to have worked.

2. The Historical Test.

The next test applied by this Court is a historical analysis. This Court recently affirmed that, if the statute itself does not provide a clear answer, the next step of inquiry "ask[s] whether the 'history of appellate practice' yields an answer." *McLane*, 137 S. Ct. at 1166 (quoting *Underwood*, 487 U.S. at 558). As discussed above, "the longstanding practice of the courts of appeals in reviewing" determinations of insider status, *id.*, is to apply a searching, *de novo* standard of review. This majority rule adheres to the more general practice in bankruptcy appeals to apply *de novo* review of bankruptcy court interpretations of undefined legal categorizations in the Bankruptcy Code, treating them as matters of statutory interpretation.

For example, in *First Nat'l Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689 (10th Cir. 2014), the Tenth Circuit had to decide the appropriate standard for review of a bankruptcy court's evaluation of factors in determining whether a debt for a principal residence had "arise[n] out of" a "farming operation," both of which were undefined terms in the Bankruptcy Code. The bankruptcy court had not adopted any specific legal test and instead concluded as a factual matter that the debt arose from a farming operation that satisfied the statute. That ruling was reversed by the Tenth Circuit in reasoning that is apposite here. The Tenth Circuit found that, "[a]lthough it is true that the bankruptcy court did not explicitly identify

the legal test it applied in reaching its conclusion, the court necessarily must have determined that the facts on which it relied were legally sufficient to meet the statute's requirements." *Id.* at 693 n.1. *De novo* review therefore was required, as the analysis essentially constituted a legal question of statutory interpretation even though the bankruptcy court had treated it as an issue of fact. *Id.* at 693. This case presents essentially the same question regarding the standard of review as *Woods*, and it is far from an anomaly. A number of circuits, including the Ninth Circuit, have had a longstanding practice of applying *de novo* review for appeals challenging the lower courts' determinations of how to weigh or to apply significance to some categories of evidence over others. *See, e.g., In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.").[6]

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6. *See also Indmar Prods., Inc. v. Comm'r*, 444 F.3d 771, 774 (6th Cir. 2006) ("'Whether the [lower] court failed to consider or accord proper weight or significance to relevant evidence are questions of law we review *de novo*'") (quoting *Flying J, Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829 (10th Cir. 2005)) (in turn quoting *Harvey ex rel. Lankenbaker v. United Transp. Union*, 876 F.2d, 1235, 1244 (10th Cir. 1989)); *Schlumberger Res. Mgmt. Servs., Inc. v. CellNet Data Sys., Inc.* (*In re CellNet Data Sys., Inc.*), 327 F.3d 242, 244 (3d Cir. 2003) (applying a "mixed standard" for reviewing "mixed questions of law and fact," by "affording a clearly erroneous standard to integral facts, but exercising plenary review of the lower court's interpretation and application of those facts to legal precepts"); *New Era Publ'ns Int'l, ApS v. Carol Pub. Grp.*, 904 F.2d 152 (2d Cir. 1990) (holding that "fair use" in copyright law "is a mixed question of law and fact . . . and thus the district court's conclusion on this point is open to full review on appeal");

Indeed, in many other bankruptcy contexts, the consensus rule calls for *de novo* review. This is particularly true where the bankruptcy court is given wide birth to examine a range of issues when applying undefined statutory terms. For instance, the circuit courts review *de novo* a bankruptcy court's determination of "undue burden" or "hardship" for discharging of an educational loan pursuant to section 523(a)(8) of the Bankruptcy Code. *See, e.g., Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 779 (8th Cir. 2009) ("[r]eviewing courts must consider the debtor's past, present, and reasonably reliable future financial resources, the debtor's reasonable and necessary living expenses, and 'any other relevant facts and circumstances'" because undue hardship "is a question of law, which we review de novo" except for subsidiary factual issues).[7] So, too, are determinations

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Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1566 (Fed. Cir. 1987) (holding that patent obviousness is a mixed issue of law and fact that should be reviewed *de novo* for its ultimate, quasi-legal conclusion, while allowing clear error review of underlying facts); *Piedmont Minerals Co. v. United States*, 429 F.2d 560, 562 n.4 (4th Cir. 1970) ("The characterization of the ultimate issue as one of fact, and the resulting diminution of the scope of review, does not, of course, affect the requirement that the legally relevant factors be applied in making the determination.").

7. *See also, e.g., Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1305 (10th Cir. 2004) (holding that undue hardship "requires a conclusion regarding the legal effect of the bankruptcy court's findings as to the debtor's circumstances, and is therefore reviewed de novo"); *Tenn. Student Assistance Program v. Hornsby (In re Hornsby)*, 144 F.3d 433, 438 (6th Cir. 1998) (applying *de novo* review to reverse undue hardship ruling that did "not engage in the meaningful inquiry required to evaluate" the facts. As the Eighth Circuit states, "[a]ll other circuit courts, who have addressed this issue, have concluded that an 'undue hardship' determination is a

of whether nondischargeability of student loans would be unconscionable.[8]

The Panel majority's departure from the Ninth Circuit's own historical approach to deciding this type of question (as demonstrated by *Bammer, supra*) corroborates that its deference is an outlier and not in accord with historical practice. Notably, the circuit courts' longstanding practice of applying *de novo* review to these types of questions has not resulted in any wide condemnation in the academic literature of judicial overreaching, nor any complaints in the judicial or bankruptcy communities of negative consequences.[9]

It is equally telling that the decisions applying the minority rule do so with essentially no analysis or explanation supporting the conclusion that the issue is solely factual. One of the decisions, the Fifth Circuit's 1991 decision in *Fabricators*, is itself at considerable odds with

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question of law, which requires a de novo review." *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003).

8. *See, e.g., DHHS v. Smitley*, 347 F.3d 109, 115-16 (4th Cir. 2003) (holding that definition of "unconscionable" is a legal question, and that "application of the unconscionability standard to the facts of this case constitutes a mixed question of law and fact, requiring 'a conclusion regarding the legal effect of the Bankruptcy Court's findings as to [the debtor's] circumstances[,]'" which is reviewed *de novo*).

9. In this regard, the Seventh Circuit's longstanding of *de novo* review of non-statutory insider rulings is especially noteworthy: the Seventh Circuit typically reviews mixed questions for clear error. *Compare Longview*, 657 F.3d at 509, and *Krehl*, 86 F.3d at 742, *with Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307-08 (7th Cir. 2003).

extensive dicta and discussion in another Fifth Circuit decision, *Holloway*, issued just one year later. *Compare Fabricators*, 926 F.2d at 1466, *with Holloway*, 955 F.2d at 1014. The only other circuit to agree with the Panel majority, the Fourth, did so in a similarly cursory, non-precedential unpublished opinion. *See Broumas*, 1998 WL 77842, at *8. The "historical test" requires more than just a mechanical "head-counting exercise" of identifying the majority and minority rules, *McLane*, 137 S. Ct. at 1167, so the quality of the decisions counts. Here, the minority-rule cases are sorely lacking.

For these reasons, the historical test supports *de novo* review.

3. The Functional Analysis Test.

"Where history and precedent provide no clear answers, functional considerations also play their part" in distinguishing legal considerations from factual ones. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996). The functional analysis assesses whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller*, 474 U.S. at 114. Thus, as *McLane* explains, "at least where 'neither a clear statutory prescription nor a historical tradition exists,' we ask whether, 'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" 137 S. Ct. at 1166-67 (quoting *Underwood*, 487 U.S. at 558, 558-60 (in turn quoting *Miller*, 474 U.S. at 114) (internal quotation marks omitted)). Under this test, the open-ended statutory definition of "insider" in the Bankruptcy Code, the serious

legal consequences that adhere to the determination of insider status, and the relative lack of factual disputes or credibility issues, all make the question perfectly suited for appellate decision-making.

For similar reasons, the issue should not be relegated to the individual fact-finding discretion of trial judges, as that inevitably leads to disparate standards governing a critical legal status under the Bankruptcy Code. Put simply, is the question of whether someone is an insider under the Bankruptcy Code such a case-specific, factually nuanced determination that it is better policy to defer to the judgment of the individual judge, even if virtually identical fact situations could result in contradictory outcomes depending upon the particular views, values, and even caprice of the deciding judge? That outcome is untenable—insider status is a *legal* status and thus should have consistent application—yet that is the likely result of the Panel majority's decision. For numerous reasons, therefore, appellate courts must have authority to shape this type of decision.

From an institutional perspective, appellate courts are much better situated to decide norms and standards that give meaning and limits for open-ended statutory terms. *See Salve*, 499 U.S. at 232 ("[c]ourts of appeal . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy"). In cases where the applicable legal principles established to date "are not 'finely-tuned standards,'" but "are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed," *Ornelas*, 517 U.S. at 696, the deciding court must determine and graft its own determination of the key considerations

onto the facts—a quasi-legal determination. In such cases, where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114 (citing *Bose*, 466 U.S. at 503).

This Court, thus, has held in the Fourth Amendment context that, because "the legal rules for probable cause and reasonable suspicion acquire content only through application[,] [i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. The same logic applies for determinations of whether a confession is voluntary. *See Miller*, 474 U.S. at 115-16. Only when the legal principles are fully established and fleshed-out by precedent should the determination be considered factual and better decided by a trial judge.

As discussed above, the norms for deciding non-statutory insider status are not established. Basic questions regarding which factors are relevant and how they should be weighed remain open, and the inquiry itself is still largely open-ended. These questions are quintessential appellate issues.

A second consideration looks to the effect of the determination. This factor considers whether consistency of decisions and the need for uniform standards is more important than deferring to the judicial discretion of trial courts as to how to the weigh the evidence. For example, if the question is *sui generis*, then judicial discretion is

desirable and appropriate. *See Duberstein*, 363 U.S. at 289 (explaining that deferential review recognizes "the fact-finding tribunal's experience with the mainsprings of human conduct"). But where it is important to prevent affirmance of opposite decisions on identical facts from different judicial districts in the same circuit, as might result under deferential review, this Court prefers to "allow appellate courts to clarify the legal principles" through *de novo* review. *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (discussing *Ornelas*, 517 U.S. at 697); *see also Salve*, 499 U.S. at 231 ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration."). If unifying precedent and providing greater guidance to affected parties as to the consequences of their actions are important considerations, then the appellate courts should be vested with law-clarifying authority.

This consideration favors *de novo* review here as well. The need for uniformity of standards is high: a legal status is involved, and the determination of such status will affect many areas of bankruptcy law. *See* 11 U.S.C. §§ 503(c) (limiting insider compensation); 547(b)(4)(B) (extended preference period for insider transfers); 544, 548, and 550 (provisions affecting fraudulent transfers to insiders); 702(a)(3) (excluding insider voting for chapter 7 trustees); 727(a)(7) (establishing insider conduct as basis to deny discharge); 747(1) (subordinating insider claims to other customer claims); 1129(a)(5)(B) (requiring disclosure of insider retention); and 1129(a)(10) (prohibition against insider voting). No policy justifies a judicial process under which someone might be considered an insider in one courtroom and a stranger to the transaction in another courtroom when the facts regarding their relationship

to the debtor and the transaction at issue are largely analogous. Savvy counsel would readily understand this as an open invitation for forum-shopping.

Bankruptcy law in particular should not devolve into splintered standards. The Constitution itself provides that the congressional power to enact bankruptcy laws is intended to promote "uniform laws . . . throughout the United States." U.S. CONST. art. I, § 8, c.4. Consistency of decisions and uniform standards and norms are especially important for the question of insider status to ensure adherence to the Bankruptcy Code's fundamental principle that similarly-situated creditors are treated alike and that debtors cannot use their relationships with insiders to disadvantage other creditors. The participants need clear standards and "a defined set of rules which, in most instances, makes it possible [for them] to reach a correct determination *beforehand* as to whether" their contemplated transaction will have negative legal consequences. *Ornelas*, 517 U.S. at 697 (emphasis added, internal quotation marks and citation omitted). In deciding that issue, key questions such as whether a romantic involvement between the debtor and creditor may even be treated as a material issue should not depend upon the values of a particular judge. This high need for uniformity and development of precedential authority to guide factual analysis strongly favors *de novo* review.

A third functional consideration involves the mechanics of the decision. If it rests largely on weighing the credibility of witnesses and resolving historical fact disputes, then deferential review might be appropriate. "[O]nly deferential review [gives] the district court the necessary flexibility to resolve questions involving

'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 404 (1990) (quoting *Pierce*, 487 U.S. at 561-62). Where the outcome rests on questions like witness credibility, the "superiority of the trial judge's position to make determinations of credibility" provides a pivotal "rationale for deference." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). But the converse also is true. In cases where judicial resolution of historical facts does not play a leading role in the decision, and the facts instead are largely undisputed or clear from a paper record, deference is not warranted. *See, e.g., Gen. Motors*, 384 U.S. at 141 n.16 ("Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52 (a), plays only a restricted role here. This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses.") (internal citation omitted). Little is gained by deferring to trial court decisions that are based on the same considerations that the appellate court is able to make.

Nothing in the particular nature of "insider status" requires a hands-on, in-person assessment of the evidence. Unlike determinations of bad faith, insider status does not depend on individualized subjective factors, such as scienter. In the proceedings below, none of the key historical facts was in dispute, and, thus, the Bankruptcy Court's fact-finding function was not implicated. Where the Bankruptcy Court did exercise noteworthy discretion, ironically enough, was its selection of five factors identifying non-statutory insiders based upon its canvass of other cases and its concomitant failure to consider other factors, especially factors relating to whether the

transaction was arm's-length. Pet. App. 66a; J.A. 153-54. This analysis was quintessentially legal in nature, not factual. Close case-reading is precisely the type of legal function that falls squarely in the purview of three-judge appellate panels. *See Miller*, 474 U.S. at 114 (explaining why three-judge panels are better than one judge to resolve legal questions).

For these reasons, appellate courts are well-positioned to have ultimate say in deciding whether a person or entity should be treated as a non-statutory insider under the Bankruptcy Code. From a functional perspective, *de novo* review is both appropriate and warranted.

4. The "Ultimate Issue" Test.

This Court has used a fourth test that considers whether the issue is dispositive of the broader question under consideration, *i.e.*, whether it is an "ultimate issue" that "'clearly impl[ies] the application of standards of law.'" *Pullman-Standard*, 456 U.S. at 286 n.16 (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)); *see also id.* ("[t]his Court has on occasion itself indicated that findings on 'ultimate facts' are independently reviewable."). Ultimate issues are hybrids that pose the same issues as other mixed questions. *See* Louis, *supra*, at 994 ("Ultimate facts, because they combine elements of fact and law, do not fit nicely within the fact/law dichotomy."). As with mixed questions in general, where legal issues are implicated in ultimate decisions, *de novo* review is warranted. *See, e.g., Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc) ("Lower court findings of ultimate facts based upon the application of legal principles to subsidiary facts are subject to *de novo*

review."). But where no such legal dimension is implicated, deferential review may be used. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, — U.S. —, 135 S. Ct. 831, 837 (2015).

Insider status unquestionably was the ultimate issue decided by the Bankruptcy Court. Because, for the reasons previously discussed, that decision requires the application of law to resolve that ultimate question, it should be reviewed *de novo*.

B. All of the Applicable Tests and Considerations for Resolving the Standard of Review for Mixed Questions of Law and Fact Support *De Novo* Review of Non-Statutory Insider Determinations.

The above principles lead to one conclusion: *de novo* review is required. Because the open-ended nature of the statutory definition of insider, coupled with the open-ended nature of the Ninth Circuit's standard (close relationship and no arm's length transaction), compels bankruptcy courts to fend for themselves and develop the norms and criteria they deem most appropriate and applicable, the decision is inherently legal or quasi-legal in nature. As those decisions accumulate, they will increasingly sow chaos due to the lack of clear rules educating the parties beforehand which transactions they can and cannot enter and invite forum-shopping. *De novo* review is already the historically predominant standard. Perhaps most important of all, deciding the pertinent factors for determining who is an insider under the Bankruptcy Code falls within the clear province of appellate courts. Conceptually, historically, functionally, and pragmatically, the appellate courts should have the ultimate say on this determination.

These interests are especially apt here. As affirmed by the Panel majority, the Bankruptcy Court's narrow interpretation of the statute to limit non-statutory insider analysis to questions of control, cohabitation, payment of expenses, and the purchase of expensive gifts, while ignoring whether the transaction was at arm's length, will make it more difficult to establish insider status. Moreover, the key facts ignored by the Bankruptcy Court (and thus ignored by the Panel majority due to its deference to the Bankruptcy Court) were undisputed, and thus were fully appropriate for *de novo* appellate review; their impact may be assessed by three appellate judges just as readily as by the trial judge. Appellate courts do this on a daily basis when they consider summary judgment records or motions for judgment as a matter of law. As Judge Clifton's dissent notes, the Bankruptcy Court's refusal to consider facts bearing on the lack of an arm's length transaction including Rabkin and Bartlett's close romantic and business relationship, Bartlett's failure to shop the claim to anyone other than Rabkin, and Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan, among other things, renders its decision that Rabkin is not an insider absurd on its face. *See* Pet. App. 24a-25a. Right or wrong, this is a policy question and a matter of statutory interpretation—*i.e.*, a core appellate-court function. Bankruptcy courts cannot be the sole arbiters of such a clear legal determination—one that the Panel majority itself might not have made had it applied *de novo* review. *See* Pet. App. 17a, 18a n.14, 20a, 24a.

At bottom, the Bankruptcy Court's narrow treatment of non-statutory insiders alters the statute's scope and conflicts with congressional intent that the lack of an arm's

length transaction constitutes the measure against which insider status should be assessed. *See* S. REP. No. 95-989, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810 ("An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at [arm's] length with the debtor."). Rewriting that principle to limit the statutory definition to only those individuals deemed to constitute the functional equivalents of statutory insiders, such that the question of whether the transaction was arm's length is immaterial, cries out for *de novo* appellate review.

Insider status is itself a critical distinction under the law. This Court long ago recognized in the context of claims objections under the Bankruptcy Act that transactions between insiders and their corporation must be "subjected to rigorous scrutiny." *Pepper v. Litton*, 308 U.S. 295, 306 (1939). Similarly, because the "danger inherent in any reorganization plan proposed by a debtor . . . [is] that the plan will simply turn out to be too good a deal for the debtor's owners" at the expense of disfavored creditors, the absolute priority rule protects against "the ability of a few insiders . . . to use the reorganization process to gain an unfair advantage." *Bank of Am. Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (internal citations omitted). The same holds true in other areas of the law—securities, corporations, and commercial transactions, to name a few. In light of the broad significance of a judicial determination of insider status, and the "rigorous scrutiny" courts must apply following such a determination, simple logic holds that a similar level of rigor should be applied when an appellate court reviews the determination of insider status.

But this is especially true for bankruptcy cases. Insider status is critically important in numerous areas of bankruptcy law. Not only does it affect plan confirmation fights, as in this case, but preferential and fraudulent transfer avoidance claims under sections 544, 547, 548, and 550 of the Bankruptcy Code, objections to discharge under section 727 of the Bankruptcy Code, equitable subordination, and even insider transactions subject to the Uniform Fraudulent Transfer Act and the Uniform Voidable Transaction Acts, sections 4(b) and 5(b), frequently turn on whether a creditor or transferee is an insider. Uniformity of decision as to who is and is not an insider therefore requires a clear rule for effective implementation of the Bankruptcy Code. Conversely, a wide disparity of rulings as to who is an insider and who is not does not benefit anyone, yet that would be the inevitable result if bankruptcy courts are allowed to develop their own standards with virtually no appellate oversight.

Appellate courts can readily decide insider issues. Their job is to create tests and identify material factors, weigh the factors, and apply them to the underlying facts, so requiring them to do it here is fully consistent with their historical practice. Multiple circuits have been doing it for years in this area without any reported ill effects.

If, on the other hand, statutory questions regarding a purely objective question of a legal status are relegated to the broad control of trial courts without meaningful appellate review, consistency and uniformity of open-ended statutory terms would be at risk. As disparate tests emerge, individuals would not know how to govern themselves. Moreover, because courts would have to

apply similar broad deference for open-ended terms like "investor" and "undue hardship," requiring deferential review here could result in a substantial ripple effect in numerous statutory areas, all without any clear policy benefit.

The majority rule of *de novo* review for mixed questions of law and fact thus reflects the sensible and proper approach to ensuring that insiders who have a material advantage over other creditors are not allowed to benefit from that advantage under the Bankruptcy Code. *De novo* review is required to enforce the Code's principles of fairness and equity.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for *de novo* review of the Bankruptcy Court's decision.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 4

The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

11 U.S.C. § 101(9)

§ 101. Definitions

In this title the following definitions shall apply:

***

(9) The term "corporation"--

(A) includes--

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

11 U.S.C. § 101(31)

§ 101. Definitions

In this title the following definitions shall apply:

***

(31) The term "insider" includes--

(A) if the debtor is an individual--

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation--

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership--

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

11 U.S.C. § 102

§ 102. Rules of construction

In this title--

(1) "after notice and a hearing", or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

11. U.S.C. § 503(c)

§ 503. Allowance of administrative expenses

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year

in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. § 547(b)

§ 547. Preferences

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 548(a)

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1) (B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

11 U.S.C. § 550(c)

§ 550. Liability of transferee of avoided transfer

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

11 U.S.C. § 702(a)

§ 702. Election of trustee

(a) A creditor may vote for a candidate for trustee only if such creditor--

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

11 U.S.C. § 727(a)

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case--

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of

the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date

of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

11 U.S.C. § 747

§ 747. Subordination of certain customer claims

Except as provided in section 510 of this title, unless all other customer net equity claims have been paid in full, the trustee may not pay in full or pay in part, directly or indirectly, any net equity claim of a customer that was, on the date the transaction giving rise to such claim occurred--

(1) an insider;

(2) a beneficial owner of at least five percent of any class of equity securities of the debtor, other than--

(A) nonconvertible stock having fixed preferential dividend and liquidation rights; or

(B) interests of limited partners in a limited partnership;

(3) a limited partner with a participation of at least five percent in the net assets or net profits of the debtor; or

(4) an entity that, directly or indirectly, through agreement or otherwise, exercised or had the power to exercise control over the management or policies of the debtor.

11 U.S.C. § 1129(a)

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)

(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash--

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

UNIF. FRAUDULENT TRANSFER ACT § 1 (1984)

SECTION 1: DEFINITIONS

As used in this [Act]:

(1) "Affiliate" means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) if the debtor is an individual,

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation,

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership,

(A) a general partner in the debtor;

(B) a relative of a general partner in, or a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable

process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

UNIF. FRAUDULENT TRANSFER ACT § 4 (1984)

SECTION 4: TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

(b) In determining actual intent under subsection (a)

(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

UNIF. FRAUDULENT TRANSFER ACT § 5 (1984)

SECTION 5: TRANSFERS FRAUDULENT AS TO PRESENT CREDITORS.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

UNIF. VOIDABLE TRANSACTIONS ACT § 1 (1984)

SECTION 1: DEFINITIONS.

As used in this [Act]:

(1) "Affiliate" means:

(i) a person that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim", except as used in "claim for relief", means a right to payment, whether or not the right is reduced

to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person that has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Insider" includes:

(i) if the debtor is an individual:

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation:

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership:

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

(12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

(16) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

(17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

UNIF. VOIDABLE TRANSACTIONS ACT § 4 (1984)

SECTION 4: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITOR.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)

(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subsection (a) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

UNIF. VOIDABLE TRANSACTIONS ACT § 5 (1984)

SECTION 5: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Subject to Section 2(b), a creditor making a claim for relief under subsection (a) or (b) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

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No. 15-1509

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL.,
PETITIONER

v.

THE VILLAGE AT LAKERIDGE, LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the appropriate standard of review is de novo or clear error when reviewing a bankruptcy court's ultimate finding that a claimholder is or is not a non-statutory insider under 11 U.S.C. 101(31) of the Bankruptcy Code.

RULE 29.6 STATEMENT

The Village at Lakeridge, LLC is wholly owned by MBP Equity Partners 1, LLC, which itself is a privately held limited liability company in Nevada.[1]

[1] The case caption on this Court's docket indicates that there are multiple petitioners and respondents in the case, but the sole petitioner is U.S. Bank National Association and the sole respondent is The Village at Lakeridge, LLC. The full parties to the proceeding are otherwise listed in petitioner's brief (at ii).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Introduction 2
Statement 4
Summary of argument 17
Argument 19
I. The court of appeals correctly reviewed the lower court's purely factual determination of non-statutory insider status for clear error 19
A. The lower court's non-statutory insider determination turned entirely on a factual inquiry 20
B. There is simply no dispute over the legal standard for deciding non-statutory insider status 24
II. Affirmance is warranted even if the lower court's determination of non-statutory insider status is deemed a mixed question of law and fact 26
A. There is no explicit statutory directive regarding the standard of review 27
B. There is no consistent historical practice—aside from this Court's heavy reliance on clear-error review outside the constitutional context 27
C. As a matter of the sound administration of justice, trial courts are far better positioned to decide this fact-intensive issue 29
Conclusion 33

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 19, 31
Anstine v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272 (10th Cir. 2008) ..... *passim*
Bose Corp. v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) 29
Comm'r v. *Duberstein*, 363 U.S. 278 (1960) 29
Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) 26, 31, 32
Czyzewski v. *Jevic Holding Corp.*, 137 S. Ct. 973 (2017) 4
Dye v. *Brown (In re AFI Holding, Inc.)*, 530 F.3d 832 (9th Cir. 2008) 6
First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 26, 29
Hana Fin., Inc. v. *Hana Bank*, 135 S. Ct. 907 (2015) 28
Hazelbaker v. *Hope Gas, Inc. (In re Rare Earth Minerals)*, 445 F.3d 359 (4th Cir. 2006) 32
Highmark Inc. v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) 26
Koon v. *United States*, 518 U.S. 81 (1996) 26, 31
Krehl, In re, 86 F.3d 737 (7th Cir. 1996) 6, 27
Kreuger v. *Torres (In re Kreuger)*, 812 F.3d 365 (5th Cir. 2016) 32
Kunz, In re, 489 F.3d 1072 (10th Cir. 2007) 29
Lilly v. *Virginia*, 527 U.S. 116 (1999) 29
Longview Aluminum, L.L.C., In re, 657 F.3d 507 (7th Cir. 2011) 21, 29
McLane Co., Inc. v. *EEOC*, 137 S. Ct. 1159 (2017) ..... *passim*

Page

Cases—continued:

Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 23
Miller v. *Fenton*, 474 U.S. 104 (1985) 18, 22
Ornelas v. *United States*, 517 U.S. 690 (1996) 29
Pierce v. *Underwood*,
487 U.S. 552 (1988) 18, 26, 29, 30
Pullman-Standard v. *Swint*,
456 U.S. 273 (1982) ..... *passim*
Rosiles-Camarena v. *Holder*, 735 F.3d 534
(7th Cir. 2013) 28
Salve Regina Coll. v. *Russell*,
499 U.S. 225 (1991) 19, 29
Schubert v. *Lucent Techs. Inc. (In re Winstar*
Commc'ns, Inc.), 554 F.3d 382 (3d Cir. 2009) ... 5, 20, 27
Teva Pharm. USA, Inc. v. *Sandoz, Inc.*,
135 S. Ct. 831 (2015) 22, 23, 31
Top Hat 430, Inc., In re, 568 B.R. 314
(B.A.P. 8th Cir. 2017) 29
U.S. Postal Serv. Bd. of Governors v. *Aikens*,
460 U.S. 711 (1983) 23
United States v. *Yellow Cab Co.*,
338 U.S. 338 (1949) 30
Weinman v. *Walker (In re Adam Aircraft*
Indus., Inc.), 510 B.R. 342 (B.A.P. 10th Cir. 2014) 6

Statutes and rules:

Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*
11 U.S.C. 101(31) ..... I, 2, 5, 27
11 U.S.C. 101(31)(B) 5
11 U.S.C. 105(d)(1) 27, 32
11 U.S.C. 105(d)(2) 27
11 U.S.C. 1121-1129 4
11 U.S.C. 1122 4
11 U.S.C. 1123 4
11 U.S.C. 1124(1) 4

Page

Statutes and rules—continued:

11 U.S.C. 1126(c) 4
11 U.S.C. 1126(e) 4, 16
11 U.S.C. 1129(a) 4, 5, 12
11 U.S.C. 1129(a)(10) 5, 12
11 U.S.C. 1129(a)(3) 4
11 U.S.C. 1129(a)(8) 4
11 U.S.C. 1129(b)(1) 5
28 U.S.C. 1254(1) 1
Fed. R. Bankr. P. 7052 2
Fed. R. Bankr. P. 9014(c) 2
Fed. R. Civ. P. 52(a)(6) ..... *passim*

Miscellaneous:

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985) 21
S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978) 5

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 814 F.3d 993. The opinion of the bankruptcy appellate panel (Pet. App. 28a-60a) is unreported but available at 2013 WL 1397447. The order of the bankruptcy court (Pet. App. 61a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2016. A petition for rehearing was denied on March 16, 2016 (Pet. App. 71a-73a). The petition for a writ of certiorari was filed on June 13, 2016, and granted in part on March 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(31) of Title 11 of the United States Code defines the term "insider," and is reproduced in the appendix to the petitioner's brief (at 2a-3a).

Rule 52 of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings and Conclusions by the Court; Judgment on Partial Findings
>
> (a) Findings and Conclusions.
>
> * * *
>
> (6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.[2]

INTRODUCTION

A bankruptcy court's "non-statutory insider" determination requires a highly fact-intensive analysis that ultimately turns on whether the parties transacted at arm's length. Petitioner contends that this case-specific conclusion should be reviewed de novo: Every appellate body in the judicial-review process should redo the bankruptcy court's work, using scarce judicial resources to mine the record anew and examine transcripts of events that the bankruptcy judge witnessed in person. Petitioner is wrong on multiple levels. It misunderstands the insider analysis and the framework for determining the standard of review. For two reasons, this Court's standard-of-review precedents point squarely to clear-error review.

---

[2] Rule 52 applies in the bankruptcy setting by virtue of Fed. R. Bankr. P. 7052 and 9014(c).

First, contrary to petitioner's primary assertion, the non-statutory insider determination is not a mixed question at all, but a pure question of ultimate fact. Whether a transaction was at arm's length is inherently bound up with the details of the transaction and the parties' motivations and intent. Just as in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), those conclusions represent a finding of *fact* subject to clear error review.

Second, even if petitioner were correct that this is instead a mixed question, affirmance would still be proper under the Court's usual framework for examining mixed questions, which looks first to a statutory directive, then to historical tradition, and finally to functional considerations—asking which judicial actor is best positioned to decide the issue. There is no statutory directive here, and petitioner's contention that historical practice requires de novo review is obviously wrong—by petitioner's own count, the circuits have divided 4-3 on this question. By contrast, this Court has consistently used clear-error review to assess issues that lack a constitutional nexus. The functional considerations remove any doubt about the proper result. Questions of motivation, intent, and credibility plainly belong with the factfinder. And prescribing de novo review for two rounds of review reduces judicial economy, and delays what Congress intended to be the swift resolution of a bankruptcy reorganization. On the flip side, independent appellate examination offers little value for such case-specific determinations that are not imbued with broader, normative judgments. Clear-error review should apply, and the Ninth Circuit's decision should therefore be affirmed.

STATEMENT

1. a. In a Chapter 11 bankruptcy, the "debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017). The Bankruptcy Code provides detailed rules for the creation and confirmation of a reorganization plan. *E.g.*, 11 U.S.C. 1121-1129. The plan must designate classes of claims and specify the treatment of claims within each class. See 11 U.S.C. 1122, 1123.

The bankruptcy court generally may "confirm a plan only if" sixteen requirements are satisfied. 11 U.S.C. 1129(a). Among those requirements, every class that is "impaired" under the plan must approve the plan. 11 U.S.C. 1129(a)(8); see 11 U.S.C. 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan."). A class is impaired if its "legal, equitable, [or] contractual rights" have been "[]altered." 11 U.S.C. 1124(1). The plan also must have been "proposed in good faith." 11 U.S.C. 1129(a)(3). Separately, any "party in interest" may ask the bankruptcy court to "designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." 11 U.S.C. 1126(e).

Section 1129(b) provides an alternative path to confirmation where consent of every impaired class cannot be obtained in compliance with subsection (a)(8). Here the

court must find that "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. 1129(b)(1). The other requirements of Section 1129(a) also still must be met, including the requirement that "at least one class" of impaired claims must approve the plan, "determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10).

b. The 1978 Bankruptcy Code added "insider" as "a new term." S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978). "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." *Ibid.* The Code categorically dubs certain persons and entities "insiders." See 11 U.S.C. 101(31). Courts call these "statutory" or "per se" insiders. Where the debtor is a corporation, "[t]he term 'insider' includes * * * (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. 101(31)(B).

Because this list is non-exclusive, courts have uniformly recognized that other persons and entities can qualify as "non-statutory" or "extra-statutory" insiders. *E.g.*, Pet. App. 9a (citing *Schubert* v. *Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009)). Although the circuits have phrased the legal standard slightly differently, the general principle is that non-statutory "[i]nsider status may be based on a professional or business relationship with the debtor, * * * where such relationship compels the conclusion that the individual or entity has a relationship with the debtor, close enough to

gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Dye* v. *Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 849 (9th Cir. 2008) (citation omitted); accord, *e.g.*, *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1276 (10th Cir. 2008). Accordingly, "courts have looked to the closeness of the relationship between the parties and to whether any transactions between them were conducted at arm's length." *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996). The touchstone of the inquiry, however, is whether the parties transacted at arm's length: "a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length." *U.S. Med.*, 531 F.2d at 1280. Closeness alone does not suffice. *Id.* at 1277-1278. In all events, the inquiry is "highly fact-intensive" and demands a case-by-case analysis. *Weinman* v. *Walker (In re Adam Aircraft Indus., Inc.)*, 510 B.R. 342, 350 (B.A.P. 10th Cir. 2014).

2. Respondent, a limited liability company, owned and operated a commercial real estate property in Reno, Nevada. Pet. App. 30a. Respondent has one member, MBP Equity Partners 1, LLC (MBP). *Id.* at 3a. MBP is managed by a five-person board and has around twelve different investors through various investment mechanisms. *Ibid.*; J.A. 135-136. Kathleen Bartlett is a member of the board and an investor (through her deceased husband's 401(k)). J.A. 135-136. MBP's "full investor group" makes "major decisions," while the board retains authority over other matters. J.A. 136. Bartlett alone cannot make any decisions for MBP or respondent. J.A. 137. Both MBP and Bartlett are insiders for purposes of Section 1129.

Respondent entered Chapter 11 bankruptcy in June 2011 and filed its initial reorganization plan in September. Pet. App. 3a. Two creditors held claims on respondent's

assets: petitioner, which held a secured claim of about $10 million derived from respondent's initial financing of its property purchase; and MBP, which held a $2.76 million unsecured claim. *Ibid.* The plan impaired both claims.

MBP's investor group decided to sell MBP's claim for $5,000. J.A. 137, 146. As they testified below, their reasoning was twofold: they thought that selling the claim would yield tax benefits, and the claim was worthless to MBP because MBP could not vote in favor of respondent's reorganization plan. Pet. App. 3a-4a & n.4; see also J.A. 137-138, 145. The group discussed several potential purchasers but settled on Dr. Robert Rabkin, a Reno local and retired surgeon. Pet. App. 4a; J.A. 106, 146.[3] Although Rabkin has no affiliation with respondent, MBP, or MBP's board, he and Bartlett "share[] a close business and personal relationship." Pet. App. 4a. Rabkin had met Bartlett, an experienced realtor, in 2010 when she helped him with a home search. J.A. 107, 142. At some point the relationship turned "romantic," J.A. 128, 142, but they do not live together, share credit cards, lend each other money, or give each other significant gifts. J.A. 121-122, 133-134, 143-144; Pet. App. 66a.

Executing the investor group's decision, Bartlett offered MBP's claim to Rabkin in September 2011. Pet. App. 4a. He understood that she did not individually have the power to sell the claim. J.A. 114-115. Rabkin considered the offer for a month or two, during which time he and Bartlett discussed the offer several times, and he walked through the property and likely saw a rent roll.

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[3] Bartlett testified that she could not recall precisely why the group chose Rabkin, except to say that "he was around" and "in town" and "seemed like the most viable candidate at the time." J.A. 146. In light of the limited value of the claim (offered at $5000), it is unremarkable that the group did not devote extensive time to identify multiple bidders.

J.A. 108-109, 139. He did not conduct more extensive diligence because it "would have been very expensive" to do so. J.A. 110. Moreover, a $5000 investment was not "a significant" one for him given his "overall net worth." J.A. 134; see J.A. 154. Ultimately, Rabkin purchased the claim because "[i]t had the potential for a big payoff." J.A. 154 (bankruptcy court oral ruling); see J.A. 123 (Rabkin testimony that "the face value was really high" and "there was an opportunity to have a return on my investment"); J.A. 126 (stating that Bartlett indicated "that there was a possibility of making a profit").

Although Rabkin did not know the plan's payout for the claim when he purchased it, he later learned that the plan specified a $30,000 distribution and then negotiated with MBP for a higher payout in return for his vote. What spurred his higher demand was his deposition by petitioner. J.A. 116-117. At the deposition, petitioner's counsel offered to buy the claim for $50,000 and then for $60,000. Pet App. 4a-5a. Rabkin was "appalled" (J.A. 119) and reacted by stating he was "really amazed at a deposition that you go and you get into a negotiation." C.A. Record Excerpts 681. The attorney nonetheless repeatedly pushed Rabkin to accept $50,000 on the spot, while Rabkin repeatedly asked to consider the offer and confer with his own attorney. *Id.* at 680-694; see J.A. 119 (Rabkin testifying that petitioner's counsel "put [him] on the spot" and "badger[ed]" him). Petitioner's counsel finally relented in stating that Rabkin had a week to consider the $50,000 offer but the $60,000 offer had to be accepted "today." C.A. Record Excerpts 692; see J.A. 117. When Rabkin did not accept either offer, they lapsed. Pet. App. 5a.

The bankruptcy judge explicitly concluded that it was not "at all surprising" that Rabkin did not accept petitioner's offers. J.A. 155. That was because its attorney's "conduct" in making them was so "appalling," "offensive,"

and "highly inappropriate" that the judge felt compelled to "apologize" to Rabkin "[o]n behalf of the legal profession." J.A. 119-120. The court elaborated:

> [Y]ou've got somebody in a deposition, the lawyer offers him a check unannounced; that's just not the way business is done. And I frankly don't think that's the way depositions should be conducted. So it doesn't surprise me that Dr. Rabkin would be offended by that * * * . I just don't think that's a fair – I just don't think the manner in which that was presented gives rise to much of anything in terms of my decision. * * * I just think that that's a highly inappropriate setting to try and do it.

J.A. 150-151; see J.A. 121 (bankruptcy court explaining that the offer should not have been made "during the course of a deposition where you have somebody under oath. I think your conduct was bad. I don't know that it's sanctionable but I thought it was offensive.").

While Rabkin was understandably "[un]interested in dealing with the people who made the offer" in that manner (J.A. 155), he went back to Bartlett to demand "more money" from MBP, J.A. 141. Rabkin testified that the bases for his demand were that his legal expenses were more than he had anticipated and that petitioner's offer showed that the claim's "minimum value is worth at least" $60,000. J.A. 118; see *ibid.* ("I thought that my outlay would be somewhere on the order of 5,000 give or take. And it looks like there are going to be a lot more expenses."); J.A. 131. Rabkin made his vote for the plan contingent on this increase, and Bartlett responded that "the full group of investors" in MBP would have to approve the request. See J.A. 131, 141-142, 147. Rabkin's undisputed understanding was that if he voted for the plan, he would receive $60,000. See, *e.g.*, J.A. 130-131; Bankr. Doc. No. 255 at 75-

76 (counsel explaining to the bankruptcy court that Rabkin's "ballot was cast in favor of the plan with his understanding that the Debtor would follow through and come back to the Court and ask for permission to modify the treatment" to provide for $60,000).

Petitioner thus tells only a shred of the story when it states that it is "[un]disputed" and "[un]controverted" that Rabkin "rejected" its offers "even though the maximum he could be paid under the Plan for his $5,000 'investment' was $30,000." Br. 12. Petitioner omits the "appalling," "offensive" context of its offers (J.A. 120-121), and the undisputed testimony that everyone expected the plan to be amended to pay him $60,000, not $30,000. Indeed, although these facts escaped petitioner's statement, they did not elude the Ninth Circuit. The court noted that Rabkin "felt pressured to accept U.S. Bank's cash offer while he was under oath, without having time to review it first," and further quoted the bankruptcy court's negative reaction to petitioner's tactics. See Pet. App. 4a-5a & n.5. It also remarked that Rabkin cast his vote only "on the understanding that Lakeridge would amend the reorganization plan to increase his payout to an amount comparable to that offered by U.S. Bank." *Id.* at 18a.[4]

In light of that understanding, Rabkin voted to accept the plan. See, *e.g.*, Pet. App. 18a; J.A. 102, 130. Although profit was his only motive when he purchased the claim (Pet. App. 4a), he later realized "that there is some value in * * * having local ownership of" respondent's property. J.A. 133 ("I also feel that I'm proud of the community.").

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[4] Rabkin did not formally note this contingency on his ballot, but as the record shows and the Ninth Circuit confirms, there is no doubt about what he expected a modified plan to provide should he vote to approve it.

3. a. In July 2012 petitioner moved to designate Rabkin's claim as an "insider" claim and to disallow it for voting purposes. J.A. 64-82. It made three separate arguments: (1) Rabkin was a non-statutory insider; (2) MBP's assignment of the claim to Rabkin was made in bad faith; and (3) Rabkin became a statutory insider by acquiring his claim from an insider, *i.e.*, MBP. In an oral ruling memorialized in a written order, the court rejected the first two but accepted the third and accordingly denied confirmation.

First, the bankruptcy court rejected the contention that Rabkin is a non-statutory insider. The Court wrote that, "among other things":

> (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay Mr. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

Pet. App. 66a; see J.A. 154 (oral ruling: Bartlett is "one of five people who are on the management committee of the insider and from what I could tell, Dr. Rabkin didn't have any influence on them."); J.A. 148 (petitioner's counsel conceding that "it's obvious that Dr. Rabkin doesn't have any control over the Debtor"). Rabkin thus was not "a non-statutory insider because of his relationship with Ms. Bartlett." J.A. 153.

Second, the court rejected petitioner's bad-faith argument. The court reasoned that Rabkin's due diligence "was sufficient under the circumstances" and "Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's

Plan." Pet. App. 67a; see also J.A. 154 (oral ruling: "Certainly, there was not much due diligence done by Dr. Rabkin in this case. But his purchase was – the cost of buying the claim was relatively small. It wasn't significant in the overall scheme of Dr. Rabkin's finances or his various investment properties. It had the potential for a big payoff."). At bottom, Rabkin merely was "speculating on the possibility of getting paid," and that is not "a bad motive." J.A. 154.

The court again dismissed petitioner's reliance on Rabkin's refusal of the $50,000 and $60,000 offers. It summed up: "I understand the doctor or many people would have been put off by that kind of approach and I don't think it's at all surprising that he would reject it and not really be interested in dealing with the people who made the offer to him thereafter." J.A. 155.

Third, however, the court concluded that Rabkin became an insider through the assignment of MBP's claim. Pet App. 67a. According to the court, the assignment made Rabkin "acquire[] the same status as a statutory insider." *Ibid.* This conclusion meant that Rabkin's vote could not be counted, so the reorganization plan lacked the approval of any impaired class. Cf. 11 U.S.C. 1129(a)(10). The bankruptcy court thus denied confirmation. Pet. App. 68a.

b. Respondent appealed, and petitioner cross-appealed to challenge the findings on the non-statutory insider and bad-faith conclusions. The bankruptcy appellate panel (BAP) affirmed in part, reversed in part, and vacated in part. Pet. App. 29a-60a.

First, the BAP concluded that the bankruptcy court's finding on non-statutory insider status was not clearly erroneous. Pet. App. 41a-44a. "Whether a party is an insider in relation to a debtor is a question of fact reviewed for

clear error." *Id.* at 37a. The court framed the legal standard as requiring consideration of "(1) the closeness of the parties and the relative control each has over the other, and (2) whether the degree of control is such that it would render its transaction with the debtor not arms-length." *Id.* at 42a-43a. It noted that "[t]he bankruptcy court heard testimony from Rabkin and Bartlett concerning Rabkin's motivations for purchasing the MBP Claim, the lack of control exerted by either Rabkin or Bartlett over each other's actions, and the nature of their relationship." *Ibid.* The BAP held that the court's conclusion was "supported by the testimony of the witnesses and other evidence presented at the hearing" and thus not clearly erroneous. *Id.* at 44a.

Next, the BAP rejected the bankruptcy court's "rul[ing] [that], as a matter of law, a non-insider becomes a statutory insider automatically by acquiring an insider claim." *Id.* at 45a. Assignment "does not by itself change the insider status of the claimant." *Id.* at 47a. The court's contrary ruling also was inconsistent with the principle that the insider-status inquiry "is fact-intensive[] and made on a case-by-case basis." *Ibid.*

Finally, the BAP held that it was not clear error to find absence of bad faith. *Id.* at 50a-54a. As the bankruptcy court concluded, Rabkin acted consistently with a legitimate profit motive. His purchase was "a speculative investment" that did not require any "special due diligence." *Id.* at 53a. As to petitioner's reliance on Rabkin's refusal to accept the $50,000 and $60,000 offers, the BAP noted that the bankruptcy court found this "ploy" "'offensive'" and "'appalling,'" prompting the court's apology "for USB's counsel's behavior." *Id.* at 52a-53a.

The BAP therefore vacated "that part of the order deciding that the Debtor does not have an impaired, assenting class of claims necessary to confirm the plan, and the decision denying confirmation." *Id.* at 60a.[5]

c. In a divided opinion, the Ninth Circuit affirmed the rulings on insider status. Pet App. 1a-27a. In a separate, unpublished opinion, the court unanimously affirmed the rejection of petitioner's bad-faith argument. J.A. 157-160.

First, all members of the panel rejected the bankruptcy court's conclusion that Rabkin "bec[a]me a statutory insider solely by acquiring a claim from a statutory insider." Pet. App. 10a. The term "insider" refers to a claimant, not a claim, and thus "general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply." *Ibid.* Like the BAP, the Ninth Circuit emphasized that the insider determination requires an "intensive factual analysis," not the mechanical, categorical rule that the bankruptcy court adopted. *Id.* at 11a. Under the bankruptcy court's holding, "a third-party assignee could be foreclosed from voting a claim acquired from an insider, *even if the entire transaction was conducted at arm's length.*" *Ibid.* (emphasis added). Further, the bankruptcy court's view is unnecessary to protect secured creditors because Section 1129 already "contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan." *Ibid.*

Second, the Ninth Circuit held that the bankruptcy court did not clearly err in denying non-statutory insider status. The majority explained that, while determining "the definition of non-statutory insider status" is "a purely

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[5] The BAP also ruled on two procedural issues irrelevant to the question presented. See Pet. App. 56a-60a.

legal inquiry," deciding "[w]hether a specific person qualifies as a non-statutory insider is a question of fact" subject to clear-error review. *Id.* at 8a; see *id.* at 15a n.13 ("whether the facts of this case are such that Rabkin met that definition" "is a purely factual inquiry"). Responding to the dissent's assertion that insider status is a mixed question, the majority characterized that position as an improper "backdoor to reassessing the facts." *Id.* at 15a n.13; see *id.* at 23a (Clifton, J., dissenting) ("[T]hat finding turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts.").

As to the legal definition of non-statutory insider, the Ninth Circuit stated the standard discussed above, explaining that "[a] court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length." *Id.* at 14a; see *id.* at 23a (Clifton, J., dissenting) (agreeing with majority's statement of the standard). Contrary to petitioner's assertions here, the majority left no doubt that the bankruptcy court applied the correct legal standard: "The court's failure to use the words 'arm's length transaction' is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider." *Id.* at 17a n.15.

"[O]n the record presented," the bankruptcy court's conclusion that "Rabkin was not a non-statutory insider" was not clearly erroneous. *Id.* at 18a. Rabkin and MBP exhibited no control over each other, and Bartlett was just "one of MBP's five managing members." *Id.* at 16a. Anyhow, "Rabkin and Bartlett kept separate finances, lived separately, and conducted business separately." *Ibid.* And as to Rabkin's purchase decision, "it was a small investment upon which Bartlett had indicated he could make a profit and 'due diligence would have been very expense,'"

and Rabkin expected a plan amendment that would "increase his payout to an amount comparable to that offered by U.S. Bank." *Id.* at 17a-18a.

The majority repeatedly rebuffed the dissent's attempts to fight the district court on the facts. For instance, while "[t]he dissent argues that 'the only logical explanation for Rabkin's actions' is that '[h]e did a favor for a friend,'" "the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical." *Id.* at 17a n.16 (first alteration added). More broadly, the majority chided the dissent for "explain[ing] how it would have decided this case had it been sitting as the bankruptcy court judge," when "[t]his court cannot substitute its judgment for that of the bankruptcy court." *Id.* at 16a n.14. The court thus affirmed the BAP's judgment. *Id.* at 18a.

In the unpublished opinion, the Ninth Circuit made short work of petitioner's bad-faith argument under 11 U.S.C. 1126(e). Again, while "Rabkin had not conducted much due diligence," his purchase was mere "speculative investing with no bad motive" given the "'potential for a big payoff.'" J.A. 159. Petitioner's "heavy-handed tactics during Rabkin's deposition" understandably justified his refusal to deal with them. J.A. 159-160. The bankruptcy court's conclusion thus was not clearly erroneous.

4. This Court granted certiorari limited to the question of the appropriate standard of review for determining non-statutory insider status. The Court declined to review the legal standards for determining whether a creditor is a statutory or non-statutory insider. Compare J.A. 161 with Pet. i.

SUMMARY OF ARGUMENT

I. Contrary to petitioner's contention, whether "a specific person qualifies as a non-statutory insider" is not a mixed question at all, but a question of ultimate fact. Pet. App. 8a; see *Pullman-Standard* v. *Swint*, 456 U.S. 273, 285-288 & n.16 (1982). It ultimately asks whether a specific transaction was conducted at arm's length, an inherently *factual* issue. It requires closely examining the particular details of the transaction, the motivation and intent of the parties, the nature of their relationship, and the character of their interactions. The answers are bound up with the case-specific details of the highly factual circumstances below. Indeed, the answer typically turns on the parties' *intent*—whether they were truly negotiating in their own self-interest or motivated instead by a connection to the other side. Those are *quintessential* fact issues. And none of that has anything to do with normative or legal judgments; it is inherently *descriptive*, and it requires a historical determination of what actually happened below. That ultimate finding is subject to the same deferential review as any other historical fact, and there is no basis for departing from Rule 52(a)(6)'s command—which expressly limits review of "[f]indings of fact" to clear error. Fed. R. Civ. P. 52(a)(6).

In contending otherwise, petitioner simply misunderstands the substantive analysis. Everyone agrees that the bankruptcy court's *legal* rulings—including its "definition of non-statutory insider status"—are subject to de novo review. Pet. App. 8a. And that is precisely what the court of appeals held below: "we reviewed de novo the bankruptcy court's definition of non-statutory insider status." Pet. App. 15a n.13. So if the bankruptcy court had *actually* abandoned or modified the legal standard—as petitioner wrongly contends—its decision would have been cor-

rected without deference. But it is a different matter entirely "*whether the facts of this case are such that Rabkin met that definition.*" *Ibid.* (emphasis added). Just as in *Pullman-Standard*, that highly fact-intensive historical review is "a purely factual inquiry," and it is "properly left to clear error review." *Ibid.*[6]

II. Even if the insider determination is not a pure fact issue, it is at least a mixed question reviewed for clear error under the Court's traditional analysis. In the absence of a statutory directive or historical tradition, the Court asks whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985); see also *McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1166-1167 (2017); *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988).

This functional approach readily supports deferential review. There is no statutory directive outside Rule 52's command, which favors respondent. Petitioner asserts that there is a clear historical practice, but that is plainly wrong. The circuits have divided 4-3 on the issue, and the majority's analysis is remarkably cursory and inconsistent. Indeed, the only lesson from history is this Court's consistent reliance on *clear error* in reviewing mixed questions outside the constitutional setting.

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[6] Petitioner repeatedly argues that the bankruptcy court failed to apply the controlling "arm's length" standard. *E.g.*, Br. 17, 28, 33. That contention was squarely confronted and rejected by the court of appeals, which held that the bankruptcy court's "entire explanation is a description of why the transaction was conducted at arm's length." Pet. App. 17a n.15. Petitioner may disagree with the appellate court's conclusion, but the court applied de novo review and adopted petitioner's own understanding of the legal standard. *Id.* at 8a (applying "de novo" review to this "purely legal inquiry"). That case-specific holding is unworthy of further review and irrelevant to the question presented.

And, critically, the core functional considerations are lopsided in favor of deferential review. The non-statutory insider determination is "a case-specific one" turning on "the application of broad standards to 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *McLane*, 137 S. Ct. at 1167 (citations omitted). Fact-bound appeals offer little gain and much to lose: any additional guidance would be limited and modest, while additional review will likely produce *less* accuracy—as appellate judges are forced to relitigate questions of motivation, intent, and credibility on a cold record. That additional review also guarantees serious institutional costs: petitioner wishes at least *three* appellate judges (over at least two rounds of review) to devote the time and resources to reviewing an entire evidentiary record to revisit fact-intensive issues already resolved once below. And the additional appeals will impair the administration of the bankruptcy estate: proposed reorganizations will be tied up in fact-bound appeals while debtors await their fresh start and creditors await any recovery for their claims. Clear-error review accommodates "the respective institutional advantages of trial and appellate courts," *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991), and it best respects judicial economy and scarce resources, *Anderson* v. *Bessemer City*, 470 U.S. 564, 574-575 (1985). The Ninth Circuit correctly applied clear-error review below, and its judgment should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY REVIEWED THE LOWER COURT'S PURELY FACTUAL DETERMINATION OF NON-STATUTORY INSIDER STATUS FOR CLEAR ERROR

According to petitioner, "insider status is a mixed question of law and fact." Br. 29-34. Petitioner is wrong.

As this case amply illustrates, the specific finding of non-statutory insider status is "a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286-288 & n.16 (1982) (describing analogous findings of "intentional discrimination" under § 703(h) of Title VII); Pet. App. 8a, 15a n.13, 17a n.15. "It is not a question of law and not a mixed question of law and fact." *Pullman-Standard*, 456 U.S. at 286-288 & n.16. Petitioner's contrary position is directly at odds with the controlling legal standard, this Court's cases, and the fundamental character of the insider determination.

A. The Lower Court's Non-Statutory Insider Determination Turned Entirely On A Factual Inquiry

As the court of appeals recognized, whether or not Rabkin is a non-statutory insider turns on whether the transaction at issue was conducted at arm's length. Pet. App. 17a n.15; see also *U.S. Med.*, 531 F.2d at 1280; Pet. Br. 54-55. The answer turns entirely on a purely *factual* inquiry. The *fact* of operating at arm's length is grounded in case-specific evidence; it is not decided by broad legal principles or normative judgments. Parties either act at arm's length or they do not; the status describes a state of the world. Trial courts may need to weigh and balance a multitude of historical facts to make that determination, but the ultimate determination is still *factual*—it requires a "fact-intensive analysis" to determine what motivated a transaction and whether parties acted in their own self-interest. Pet. App. 14a; *Schubert* v. *Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 399 (3d Cir. 2009). That involves precisely the kind of "who, when, what, and where" inquiries typical of pure fact finding.

See, *e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985).[7]

Petitioner responds that the legal standard is too "vague and amorphous" to involve merely historical facts; when "'controlling law is defined pursuant to abstract legal norms or principles, trial-level decision making necessarily involves more than a neat comparison of fact to law.'" Br. 25, 29. But the controlling test is not abstract and does not invite any normative "standard-making," *id.* at 26. The standard is fixed and straightforward: *Was the specific transaction conducted at arm's length?* Why did the parties enter the agreement? What was their motivation and intent? Did they exercise independent and unrestrained judgment?

These factual questions do not require any normative pronouncement of who *ought* to vote on a Chapter 11 reorganization plan; they invite "case-by-case decision[s] based on the totality of the circumstances" against a clear benchmark. *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011). Clear-error review is not cabined to standards with ex ante encyclopedic definitions at the highest level of granularity exhausting every possible factual scenario that might arise in the universe of human activity; a general, but administrable, standard suffices.

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[7] While courts evaluating non-statutory insider status focus on both "the closeness of the relationship between the parties" and "whether the transaction was negotiated at arm's length," the test ultimately requires a "relationship" that is "not only close, but also at less than arm's length." *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1278 (10th Cir. 2008); see also *id.* at 1280 ("[w]e hold here that a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length"); Pet. App. 14a ("A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship *and* negotiated at less than arm's length.") (emphasis added).

In this context, disputes over non-statutory insider status do not turn on the settled understanding of "arm's length," *e.g.*, *U.S. Med.*, 531 F.3d at 1277 n.4 (quoting *Black's Law Dictionary*); they turn on whether that clear standard is *factually* satisfied in each specific case.

Nor does it matter that this fact-finding "resolv[es] the ultimate issue in the case." Pet. Br. 36. The finding may dictate the end result, but "ultimate" facts are still *facts*. *Pullman-Standard*, 456 U.S. at 286 n.16. "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate [legal] question." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985); see also *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015) ("Simply because a factual finding may be nearly dispositive does not render the subsidiary question a legal one."). An arm's-length finding is still a matter of historical fact based on the trial court's assessment of what *actually* happened. Appellate courts must "remain within the constraints of Rule 52(a)" even where "pure" facts are "ultimate facts." *Pullman-Standard*, 456 U.S. at 286 n.16.

Nor is petitioner correct that only *subsidiary* facts count as "historical" facts. See, *e.g.*, Br. 26.[8] The question of a party's motivation or intent may ultimately be derived from *other* historical facts, but it is still a pure question of fact. *Pullman-Standard*, 456 U.S. at 285-288 & n.16. Indeed, "[t]he law often obliges finders of fact to inquire into a person's state of mind. * * * 'It is true that it is very dif-

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[8] Petitioner insists that "the historical facts were undisputed" (Br. 26), but this is plainly wrong. Historical facts are not merely *subsidiary* facts; they include still other historical facts *inferred or derived* from subsidiary facts—things like motivation and intent, and even the ultimate fact of whether a transaction was conducted at arm's length. Those material facts assuredly were disputed below, and the trial court's resolution of those disputes is subject to clear-error review.

ficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.'" *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716-717 (1983); see also *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (the "state of a man's mind is as much a fact as the state of his digestion") (internal quotation marks omitted).

A claimholder's motivation will be central to whether he acted at arm's length. The trial court's resolution of that fact dispute fits comfortably within familiar confines of clear-error review. See, *e.g.*, *Teva*, 135 S. Ct. at 837 (Rule 52 "applies to both subsidiary and ultimate facts"); *Pullman-Standard*, 456 U.S. at 287 (the Rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous").

Petitioner insists that any determination of non-statutory insider status is necessarily a "mixed" question because (at some level) it requires an application of law to fact. *E.g.*, Br. 16-17. That is wrong because the application of law to fact follows inexorably from the court's *factual* conclusion. This case is a paradigmatic example. The *fact-finding* was determining that the transaction was indeed at arm's length (examining the "who, what, when, and why" evidence in the record). Once the court decided, factually, the transaction was at arm's length, it automatically followed that Rabkin was not a non-statutory insider (since that fact is dispositive under the controlling standard). As such, just as in *Pullman-Standard*, this is inherently a fact question, and it is subject to review for clear error. See 456 U.S. at 286 n.16.

B. There Is Simply No Dispute Over The Legal Standard For Deciding Non-Statutory Insider Status

Because the arm's-length standard is inherently factual, petitioner tries to change the subject. According to petitioner, the lower court refused to apply the arm's-length standard at all, and instead "established its own five-factor test for deciding non-statutory insider status." Br. 28, 33; see also *id.* at 17 ("In the proceedings below, the Bankruptcy Court selected five factors to determine whether the relationship at issue was sufficiently 'close.' No standard was applied for determining whether the transaction was 'arm's length.'").

Petitioner's contention is *twice* meritless. First, as explained above, the court of appeals squarely rejected the contention that the bankruptcy court "applied the wrong legal standard." Pet. App. 17a n.15. To the contrary, it found that the bankruptcy court's "entire explanation is a description of *why the transaction was conducted at arm's length.*" *Ibid.* (emphasis added). Nor is that surprising: before the bankruptcy court, both parties identified the arm's-length test as the appropriate legal standard.[9]

Petitioner may disagree with that case-specific application of de novo review, but it cannot wish away the actual basis of the court's decision. See also *id.* at 15a n.13 (explaining that the court of appeals "reviewed de novo" this "purely legal question").

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[9] See, *e.g.*, J.A. 78 ("In determining whether a person is a non-statutory insider, courts generally focus on two basic factors: (1) the closeness of the relationship between the debtor and the transferee; and (2) whether the transaction between the transferee and the debtor was conducted at arm's length.") (petitioner); J.A. 90-91 ("The true test of an insider is one who has such a relationship with the debtor that their dealing with one another cannot be characterized as arm['s]-length transactions.") (respondent).

Second, the bankruptcy court did not fashion a new "five-factor" test. Contra Pet. Br. 17. The court simply considered a variety of factors in assessing *evidence* bearing on arm's length. The court did not purport to announce a new legal standard, and it was focused intently on the granular details of this particular record. On any fair reading, it was self-evidently a *factual* inquiry.

To be clear, the court did not restrict itself to petitioner's "five" factors. As established above, petitioner brushes aside entire sections of the court's analysis that contradict its theory. For example, the court discussed Rabkin's motives, his financial situation, his investment practices, his due diligence, his refusal to accept petitioner's "appalling" offer (which the court found "not surprising given the circumstances"), and his lack of bad faith. J.A. 120, 153-155; Pet. App. 66a-67a.

In particular, the evidence showed that Rabkin did not immediately accept the offer, but considered the deal for a month before going forward, conducted due diligence (commensurate with the $5000 investment), and ultimately pressed for more money—which is exactly what independent parties would do. He testified under oath that no one asked him to vote on the plan and he exercised independent judgment in good faith.

Such evidence underscores the fact-intensive nature of the inquiry. Had the bankruptcy court actually applied the wrong legal standard, it would have been reversed under de novo review—as the panel repeatedly explained below. Petitioner cannot avoid Rule 52 (or the actual question presented) by attacking a version of the decisions below that simply does not exist. The court of appeals was correct to hold that the ultimate finding is "a purely factual inquiry and properly left to clear error review." Pet. App. 15a n.13. The judgment should be affirmed.

II. AFFIRMANCE IS WARRANTED EVEN IF THE LOWER COURT'S DETERMINATION OF NON-STATUTORY INSIDER STATUS IS DEEMED A MIXED QUESTION OF LAW AND FACT

For decades now, this Court has applied a consistent framework to determine the standard of review for so-called mixed questions. In the absence of an "'explicit statutory command,'" the Court looks first to whether the "history of appellate practice yields an answer," and next to whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *McLane*, 137 S. Ct. at 1166-1167 (internal quotation marks omitted); see also, *e.g.*, *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-1749 (2014); *Koon* v. *United States*, 518 U.S. 81, 97-100 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990); *Pierce*, 487 U.S. at 559-560.[10]

In this case, there is no explicit statutory directive (aside from clear error under Rule 52), and there is no established historical practice (aside from this Court's routine resort to clear error *outside* the constitutional setting). Under ordinary functional considerations, trial courts are unquestionably better positioned to decide this fact-intensive issue: their firsthand experience will be more accurate, less costly, and better able to respect judicial and party time and resources. And deferential review promotes the efficient use of scarce funds in bankruptcy, while advancing the Code's interest in "the expeditious

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[10] Petitioner argues that the Court has "used four different tests" to determine the proper standard of review. Br. 17, 37-53. This is inaccurate. There are not four "tests," but a single framework with multiple steps. The Court addresses those steps in the progression outlined above. See, *e.g.*, *McLane*, 137 S. Ct. at 1166-1167.

and economical resolution of the case," 11 U.S.C. 105(d)(1)-(2). The court of appeals' use of clear-error review should be affirmed.

A. There Is No Explicit Statutory Directive Regarding The Standard Of Review

There is no clear statutory directive for the standard of review. This issue involves *non*-statutory insiders; the category is not even explicitly found in the statute, but merely implied as a result of the open-ended definition in 11 U.S.C. 101(31). See, *e.g.*, *U.S. Med.*, 531 F.3d at 1276. Congress did not textually delegate authority to anyone to decide the issue.

B. There Is No Consistent Historical Practice—Aside From This Court's Heavy Reliance On Clear-Error Review Outside The Constitutional Context

Contrary to petitioner's contention (Br. 42-46), there is no historical preference favoring de novo review. Petitioner is correct that the issue has divided the courts of appeals, but petitioner overstates the so-called "majority" view. As petitioner itself admits, the current headcount is 4-3, which hardly reflects an overwhelming or consistent practice. Indeed, the Seventh Circuit has flip-flopped its position, see *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996), and the Third Circuit has suggested it applies "'plenary review'"—before proceeding to review the critical arm's-length finding *for clear error*, *Winstar*, 554 F.3d at 394-395, 340 (ultimately asking whether the "finding that the parties did not deal at arm's length" was "clearly erroneous"); accord Pet. App. 8a, 15a n.13.

Nor has either side of the split provided an exceptionally robust explanation for its position. Petitioner claims that courts in the "majority" developed their analysis, but its support for that proposition is—*nothing*. None of the pertinent cases walk through this Court's controlling

framework, or explain (aside from raw conclusions) why the question is mixed as opposed to purely factual, or why appellate courts are in a better position to decide the intensely factual question than trial courts. This is far from the kind of historical pedigree that warrants adherence or respect. Compare, *e.g.*, *McLane*, 137 S. Ct. at 1167.

Petitioner further maintains that a host of bankruptcy-related decisions also have endorsed de novo review. Br. 42-45. Those decisions, however, involve different issues under different sections of the Code. There is no such thing as a special "bankruptcy" exception to the Court's "traditional[]" rules dictating the standard of review. *McLane*, 137 S. Ct. at 1166. Those rules focus on the specific issue under review, and it proves nothing to cherry-pick a handful of cases that also happen to involve bankruptcy. Thus even assuming petitioner's random assortment of cases were correctly decided (a proposition petitioner has not attempted to establish), those decisions still say nothing about whether *this* highly fact-specific question should be reviewed de novo.

Indeed, the only pertinent historical practice is this Court's consistent use of deferential review for mixed *statutory* questions. See, *e.g.*, *Hana Fin., Inc.* v. *Hana Bank*, 135 S. Ct. 907, 911-912 (2015). As multiple courts have recognized, the heavy cost of independent review is rarely warranted in the statutory context. See, *e.g.*, *Rosiles-Camarena* v. *Holder*, 735 F.3d 534, 538 (7th Cir. 2013). The mixed analysis is virtually always best conducted by the original finder of fact, especially given that any *legal* errors are still subject to de novo appellate review. That balance ensures the consistent and faithful application of the law, without unduly wasting judicial and

party resources on questions that do not materially benefit from a complete do-over on a cold record.[11]

C. As A Matter Of The Sound Administration Of Justice, Trial Courts Are Far Better Positioned To Decide This Fact-Intensive Issue

As is often the case, the standard of review ultimately turns upon "'the respective institutional advantages of trial and appellate courts.'" *First Options*, 514 U.S. at 948 (quoting *Salve Regina*, 499 U.S. at 231-233). Here, the trial courts are plainly better positioned to decide "[w]hether a specific person qualifies as a non-statutory insider." Pet. App. 8a.

First, non-statutory insider determinations involve precisely the kind of "multifarious, fleeting, special, narrow facts" appropriate for clear-error review. *Pierce*, 487 U.S. at 561-562; see also *Comm'r* v. *Duberstein*, 363 U.S. 278, 289 (1960). As explained above (Part I, *supra*), the inquiry requires "a fact-intensive analysis" (Pet. App. 14a) and "case-by-case decision[s] based on the totality of the circumstances." *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011); *In re Kunz*, 489 F.3d 1072, 1079 (10th Cir. 2007); *In re Top Hat 430, Inc.*, 568 B.R. 314, 318 (B.A.P. 8th Cir. 2017) ("The determination of whether a person is a non-statutory insider is fact-intensive, and must be made on a case-by-case basis."). And the

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[11] The Court's exceptions to this practice predominantly involve *constitutional* facts. See, *e.g.*, *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501-503 (1984). Those cases implicate compelling constitutional interests, and also often involve *normative* legal standards (things like "*reasonable* suspicion" or "*just* cause"). See, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 136-137 (1999); *Ornelas* v. *United States*, 517 U.S. 690, 696-700 (1996). Here, by contrast, the arm's-length inquiry does not require any sensitive determination of what the Constitution permits—it simply asks, factually, whether the parties conducted the transaction at arm's length.

ultimate determination will often turn on motive and intent, which in turn hinges on credibility—issues uniquely within the trial court's wheelhouse. Appellate judges operate at a steep disadvantage in reviewing a cold record without the benefit of observing demeanor firsthand during live testimony. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-342 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.").

Second, there are serious costs associated with de novo review. It is a poor use of judicial and party resources to ask multi-judge panels to revisit the entire evidentiary record supporting a non-statutory insider determination. See *Pierce*, 487 U.S. at 560 ("even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record"). And those costs are heightened in the bankruptcy setting: unlike ordinary civil cases, bankruptcy litigants have a right to *two* appeals, not one. In circuits with a bankruptcy appellate panel, petitioner's theory would require potentially two three-judge panels (six judges in total) to devote substantial judicial time and energy to recreating an intense factual record—all for a case-specific ruling on a fact-bound question. That task distracts judges from the work that should consume the vast majority of judicial time—addressing important questions of law.[12]

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[12] Petitioner's heavy reliance on Jones Act cases (Br. 40-42) is unavailing. Those decisions involved challenges to the *meaning of the statutory standard*. As the court of appeals explained below, issues implicating the legal definition of the statute are reviewed de novo.

Third, this is a poor and unfair use of limited party resources in bankruptcy. By their very nature, bankruptcy cases involve limited funds. Every dollar spent in litigation is a dollar that cannot be used to pay back legitimate creditors or increase the odds of a successful reorganization. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 575.

These costs are particularly intolerable given the lack of any offsetting benefit. De novo review is *less* likely to produce accurate outcomes (given the difficulty of recreating highly fact-specific controversies on a cold record). See, *e.g.*, *Teva*, 135 S. Ct. at 837 ("*de novo* review of factual findings 'would very likely contribute only negligibly' to accuracy 'at a huge cost in diversion of judicial resources'"). And it is unlikely to produce any useful guidance for future cases: "'[f]act-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'" *Cooter & Gell*, 496 U.S. at 405; see also *Koon* v. *United States*, 518 U.S. 81, 99-100 (1996). And non-statutory insider determinations are indeed fact-bound (and fact-intensive); if *any* key variables change—*e.g.*, the economics of the claim, the closeness of the parties' relationship, the amount of due diligence, the market for the transaction, the amount of negotiation, even the *demeanor or trustworthiness* of a witness—the outcome could well change with it. There is no single or uniform model of arm's-length transaction, and decisions turning

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Pet. App. 8a. The question presented asks how to review the ultimate finding of non-statutory insider status, an inherently fact-bound inquiry.

on case-specific facts will provide little guidance as a result.

Fourth, clear-error review respects the comparative experience and expertise of bankruptcy judges. Those judges have greater exposure to issues related to insider status, and they will be more familiar with the mine run of transactions in ordinary bankruptcies. This familiarity may increase their ability to spot parties acting in good or bad faith. Appellate courts, by contrast, will have less exposure to these issues. Bankruptcy cases rarely percolate up to the courts of appeals, and they have less hands-on experience officiating debtor-creditor relationships. There are sound reasons to delegate primary responsibility for deciding insider issues to those judges facing the issue (in all its forms) most frequently.

Finally, petitioner's position would frustrate the ultimate goals and objectives of bankruptcy administration. Congress has a "strong preference for finality and efficiency in the bankruptcy context." *Hazelbaker* v. *Hope Gas, Inc. (In re Rare Earth Minerals)*, 445 F.3d 359, 363 (4th Cir. 2006); see also *Kreuger* v. *Torres (In re Kreuger)*, 812 F.3d 365, 373 (5th Cir. 2016) (the Code is designed for an "efficient, orderly, and timely disposition of the debtor's assets in exchange for a discharge from debt"). De novo review encourages additional litigation that risks holding up an entire reorganization with multiple rounds of costly appeals. That delay harms the debtor and other creditors, and it interferes with "the expeditious and economical resolution of the case." 11 U.S.C. 105(d)(1). Deferential review, by contrast, will "discourage litigants from pursuing marginal appeals." *Cooter & Gell*, 496 U.S. at 404; see also *McLane*, 137 S. Ct. at 1168. It helps "streamline the litigation process by freeing appellate

courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Ibid.*

Here, those concerns not only create material benefits for the judicial process, but they also protect the integrity and efficiency of bankruptcy cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2017

ECORD
AND
BRIEFS

No. 15-1509

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL. BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

OVERVIEW 1

ARGUMENT 4

I. Respondents Fail to Show That Determining Non-Statutory Insider Status Is Factual 4

A. Intent Is Not Part of the Ninth Circuit Test for Determining Whether a Transaction Was Conducted at Arm's Length 4

B. Respondents Ignore the Normative Aspects of "Arm's-Length" Status 7

C. Respondents Mischaracterize the Bankruptcy Court's Decision 10

D. The Ninth Circuit Did Not Review Legal Aspects of the Bankruptcy Court's Findings *De Novo* 12

E. The Government Mischaracterizes the Case Law 12

II. Respondents Advance the Wrong Analysis for Deciding Mixed Questions of Fact and Law 13

A. *Teva* Supports *De Novo* Review 14

Table of Contents

Page

B. This Court Has Consistently Applied *De Novo* Review to Intermediate-Level Questions That Are Predominantly Legal 15

C. Each of the Court's Four Tests Supports *De Novo* Review 18

1. Predominantly Legal Question Test 18

2. Historical Test 19

3. Functional Test 20

4. Ultimate-Issue Test 21

III. Respondents Ignore the Untenable Consequences from Allowing Disparate Standards for Non-Statutory Insider Status 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198 (3d Cir. 2000) 17

Allen v. Comm'r, 925 F.2d 348 (9th Cir. 1991) 13

Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.), 531 F.3d 1272 (10th Cir. 2008) 5, 6, 18

Bogardus v. Comm'r, 302 U.S. 34 (1937) 20

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 8

Browning Interests v. Allison (In re Holloway), 955 F.2d 1008 (5th Cir. 1992) 6, 22

Castellani v. Kohne (In re Kucharek), 79 B.R. 393 (Bankr. E.D. Wis. 1987) 22

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 16, 17

Comm'r v. Wemyss, 324 U.S. 303 (1945) 6

Cited Authorities

Page

In re Curry,
160 B.R. 813 (Bankr. D. Minn. 1993) 22

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 13

Evans v. United Arab Shipping Co. S.A.G.,
4 F.3d 207 (3d Cir. 1993) 9

Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.),
118 F.3d 635 (9th Cir. 1997).....17

Ford v. Allied Mut. Ins. Co.,
72 F.3d 836 (10th Cir. 1996).....13

Gaudet v. Exxon Corp.,
562 F.2d 351 (5th Cir. 1977).....9

Gordon v. Vongsamphanh (In re Phongasavath),
328 B.R. 895 (Bankr. N.D. Ga. 2005).....22

Grant v. Podes (In re O'Connell),
119 B.R. 311 (Bankr. M.D. Fla. 1990) 22

Helvering v. Tex-Penn Oil Co.,
300 U.S. 481 (1937).....20

Hirsch v. Tarricone (In re A. Tarricone, Inc.),
286 B.R. 256 (Bankr. S.D.N.Y. 2002).....22

Cited Authorities

Page

Icicle Seafoods, Inc. v. Worthington,
475 U.S. 709 (1986) 17

Kaisha v. Dodson,
423 B.R. 888 (N.D. Cal. 2010) 22

In re Krehl,
86 F.3d 737 (7th Cir. 1996) 20

Lardas v. Grcic,
847 F.3d 561 (7th Cir. 2017), *cert. pet. pending*, No. 16-1508 (filed June 19, 2017) 12-13

LoPresti v. Terwilliger,
126 F.3d 34 (2d Cir. 1997) 8

McDermott Int'l, Inc. v. Wilander,
498 U.S. 337 (1991) 17, 20

McGee v. O'Conner (In re O'Connor),
153 F.3d 258 (5th Cir. 1998) 13

Mellon Bank, N.A. v. Metro Commc'ns, Inc.,
945 F.2d 635 (3d Cir. 1991) 18

Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners, Inc.),
319 B.R. 626 (B.A.P. 9th Cir. 2004) 19

Cited Authorities

Page

Miller v. Fenton,
474 U.S. 104 (1985) 8, 15, 16

Miller v. Schuman (In re Schuman),
81 B.R. 583 (B.A.P. 9th Cir. 1987) 19

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 1

Rupp v. United Sec. Bank (In re Kunz),
489 F.3d 1072 (10th Cir. 2007) 19

Rush v. Riddle (In re Standard Stores, Inc.),
124 B.R. 318 (Bankr. C.D. Cal. 1991) 22

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 23

Schubert v. Lucent Techs. Inc.
(In re Winstar Comm'ns, Inc.),
554 F.3d 382 (3d Cir. 2009) 19

Stalnaker v. Gratton
(In re Rosen Auto Leasing, Inc.),
346 B.R. 798 (B.A.P. 8th Cir. 2006) 19

Sw. Marine, Inc. v. Gizoni,
502 U.S. 81 (1991) 17

Teva Pharm. USA, Inc. v. Sandoz, Inc.,
135 S. Ct. 831 (2015) ..... *passim*

Page

United States v. Bruce,
394 F.3d 1215 (9th Cir. 2005) 9

STATUTES AND OTHER AUTHORITIES

U.S. CONST. art. I, § 8, cl. 4 21

11 U.S.C. § 363(m) 13

11 U.S.C. § 707(a) 5

11 U.S.C. § 1112(b)(4) 5

11 U.S.C. § 1126(e) 2, 6

11 U.S.C. § 1129(a)(3) 2

11 U.S.C. § 1307(c) 5

18 U.S.C. § 1152 9

BLACK'S LAW DICTIONARY (6th ed. 1990) 5

BLACK'S LAW DICTIONARY (10th ed. 2014) 5

Rule 52(d) 20

Petitioner U.S. Bank[1] replies to the brief ("Resp't Br.") of Respondent Village at Lakeridge, LLC and the brief ("Gov't Br.") of *amicus curiae*, the United States (the "Government") (collectively, "Respondents").

OVERVIEW

Respondents see the question presented by mixed fact-and-law cases as quite simple. In their view, all that is needed is a routine, binary analysis: facts are facts, and law is law, so the courts should determine whether the issue is factual or legal and decide accordingly whether to apply *de novo* or clear-error review. *See* Gov't Br. 10 (stating that, "[a]lthough a particular question may contain both legal and factual components, . . . the appropriate course" is to "'separate factual from legal matters'" and apply deferential or *de novo* review accordingly) (quoting *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015)). A century of jurisprudence and scholarship says otherwise. Mixed questions of fact and law have divided the circuits and bedeviled courts and scholars precisely because they defy such easy answers. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 289 n.19 (1982) (noting the "vexing" and "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact"). A simplistic, binary approach does not work because issues often have both factual and legal aspects.

In order to depict the issue here as quintessentially factual, Respondents mischaracterize the test for

1. Capitalized terms and terms bracketed by quotation marks have the same meaning as in Petitioner's opening brief.

determining "non-statutory insider" status as focusing on subjective intent and motive. Resp't Br. 23, Gov't Br. 18. In doing so, they conflate separate provisions of the Bankruptcy Code. Intent and motive are not elements of the applicable test for determining non-statutory insider status. Instead, they are elements for determining bad faith under *different* provisions of the Bankruptcy Code. *See* 11 U.S.C. §§ 1126(e) and 1129(a)(3) (set forth at Resp't Br. 4-5). The Bankruptcy Court rendered its finding on bad faith in a *separate* ruling that is not before this Court. In other words, Respondents rely on a flawed, misplaced analysis.

Respondents also downplay the core normative aspects of an "arm's length" determination. Under the Ninth Circuit's test, the term "arm's length" refers to a transactional *status*, not the parties' states of mind. It is determined by examining objective normative factors such as bargaining history and exercise of due diligence, yet Respondents never address these factors. They also never explain why the Ninth Circuit's test should be thrown into a mixture of criteria that will vary from court to court and judge to judge. For example, Lakeridge asserts that the "standard" for determining arm's length is "fixed and straightforward," Resp't Br. 21, but it never shows why that is so. The Government likewise asserts that the only open issues are case-specific questions of historical fact as to *"[w]hether* a transaction was arm's length," Gov't Br. 19 (emphasis added), rather than "*when* a transaction is arm's length," and it, too, fails to explain why that is so. Notably, Respondents never explain why, if non-statutory insider status is purely factual, the Bankruptcy Court had to scan rulings by other courts to glean the common determinative factors.

At bottom, Respondents misapprehend Petitioner's argument, insisting that Petitioner seeks *de novo* review of all subsidiary or historical fact findings. *See* Resp't Br. 18; Gov't Br. 13, 19. Not so. The issue is whether the Bankruptcy Court's selection of the *relevant factors* for determining non-statutory insider status (*e.g.*, whether cohabitation or commingling of finances are foremost considerations) is normative and therefore reviewed *de novo*. If the issue were factual, it would focus on historical questions such as whether Rabkin and Bartlett were romantically involved but not cohabitating; whether they were or were not sharing finances; or even "[w]hat was [their] motivation and intent?" Resp't Br. 21. The question here, however, is quite different: it addresses whether these factual issues are relevant, *i.e.*, how "arm's length" should be determined.

Determining the legal significance of those facts as they relate to insider status is principally a legal question, not one of historical fact. Respondents never refute the point that selection of the relevant factors for applying a broad standard like "arm's length" is normative and must be reviewed *de novo* to achieve consistency of application.

As for the broader question of how mixed questions of fact and law should be handled, Respondents treat it as a binary, Manichean question of fact or law and ignore the wide middle ground in which relevant factors have not yet been fleshed out by case law. The "functional" analysis strongly favors *de novo* review as to those factors because uniformity of decisions is paramount, and consistency in determining the relevant factors cannot be achieved without *de novo* appellate review. This is especially true in bankruptcy law, where the Constitution mandates uniform

laws. As the "seaman" cases demonstrate, this Court has long held that *de novo* review is required to prevent inconsistent applications of a broad statutory standard with subsidiary unresolved factors.

Finally, Respondents badly misgauge the stakes. Wide disparity as to non-statutory insider status is not tenable: it invites a legal landscape where preferences and fraudulent transfers are voidable in some courts but not in others, and where, as here, plan confirmation depends more on the selection of forum than on compliance with the Bankruptcy Code. Indeed, if *de novo* review is not available for mixed questions like this, inconsistency will reign in many statutory schemes. This Court should follow its precedents and require *de novo* review.

ARGUMENT

Part I of the Argument addresses Respondents' arguments that the statutory question here is factual. Part II addresses Respondents' arguments concerning the broader question of how courts should analyze mixed questions of fact and law. Part III addresses Respondents' arguments on impact and policy.

I. Respondents Fail to Show That Determining Non-Statutory Insider Status Is Factual.

A. Intent Is Not Part of the Ninth Circuit Test for Determining Whether a Transaction Was Conducted at Arm's Length.

Respondents contend that non-statutory insider status is a factual question because the determination focuses on

the parties' intent, and intent is a quintessential factual matter. The Government analogizes to a bankruptcy court's dismissal of a petition for "cause" under 11 U.S.C. §§ 707(a), 1112(b)(4), and 1307(c), where deferential review is required if bad faith is found. Gov't Br. 14. It then argues that, because a "determination [as to] whether two parties bargained at arm's length turns on the parties' *motivations*," the issue must be factual. *Id.* at 18 (emphasis in original). Lakeridge agrees: "A claimholder's motivation will be central to whether he acted at arm's length." Resp't Br. 23. Respondents' "factual" argument rests on this contention.

Respondents' intent-based standard is an invention of appellate convenience. Lakeridge does not cite any authority; its argument is pure *ipse dixit*. *See* Resp't Br. 23. The Government, by contrast, quotes (i) the current *Black's Law Dictionary* definition adopted by the Ninth Circuit below, Pet. App. 13a n.11 (the operative definition for this appeal), which *does not mention intent or motivation*;[2] (ii) a minor footnote in a Tenth Circuit decision quoting an old, superseded *Black's* definition that mentions good faith;[3] (iii) a Fifth Circuit decision addressing a Texas *state-law* fraudulent conveyance

2. This quoted *Black's* definition defines "arm's length" as "[a] transaction . . . conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction*, BLACK'S LAW DICTIONARY (10th ed. 2014). The focus is on conduct, not subjective intent and good faith.

3. *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) (quoting *Black's Law Dictionary* (6th ed. 1990)). The decision never actually considers intent, motive, or bad faith in its analysis of whether the transaction was made at arm's length.

statute, *not the Bankruptcy Code*;[4] and (iv) an immaterial *tax* decision.[5] Gov't Br. 17-18. Indeed, contradicting the Government's premise, the Tenth and Fifth Circuit decisions *both* apply *de novo* review, *not* deferential review. *See U.S. Med.*, 531 U.S. at 1275 ("[W]e have a mixed question of law and fact where the legal analysis predominates. Our review is therefore de novo.") (internal citation omitted); *Holloway*, 955 F.2d at 1012 ("[We] give our careful scrutiny to the subject transactions.").

Neither the Bankruptcy Court nor the Panel majority below focused on intent. The findings cited by Lakeridge (Resp't Br. 25) were made in a subsequent, *different* ruling when the Bankruptcy Court addressed *separate grounds* for rejecting the cramdown plan under a bad-faith test in 11 U.S.C. § 1126(e). *Compare* Pet. App. 66a-67a (insider-status ruling) *with* Pet. App. 67a (no bad-faith ruling). The Ninth Circuit also addressed bad faith in a separate unreported decision. Pet. App. 6a n.6. The lack of an intent requirement for "arm's length" also distinguishes

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4. *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1013-1014 (5th Cir. 1992). The decision uses the term "commercial motivation" to address whether a transaction is commercially reasonable—an objective fact that does not involve subjective intent.

5. The Government miscites a 1945 *tax* decision as having ruled that, "for purposes of the gift tax, a transaction 'at arm's length' is 'free from any donative intent.'" Gov't Br. 18 (quoting *Comm'r v. Wemyss*, 324 U.S. 303, 306 (1945)). *Wemyss* merely quoted a Treasury regulation referring to a "'transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, ***and*** free from any donative intent).'" *Id.* (emphasis added, citation omitted). Intent thus was *not* an element of "arm's length" in *Wemyss*.

this case from the "cause" cases cited by the Government. Gov't Br. 14.[6]

Finally, Respondents conspicuously ignore the Ninth Circuit definition of "arm's length" (the current *Black's* definition) that nowhere mentions intent. *See* Pet. App. 13a n.11; *see also* n.2, *supra*. No circuit recognizes intent as a relevant, let alone predominant, element of the Bankruptcy Code test for "arm's length." This lack of case law illustrates perfectly why *de novo* review is required. A decision that intent is relevant cannot be left to trial-court discretion, such that intent is relevant in some courtrooms but not in others. This is a legal determination, and the appellate courts need plenary-review authority to ensure legal consistency.

B. Respondents Ignore the Normative Aspects of "Arm's-Length" Status.

The general test that non-statutory insider status refers to non-arm's-length transactions by parties in close relationships derives from one cryptic sentence in the statute's legislative history. Respondents cite the legislative history as if it were a substitute for applying the statute, *i.e.*, as if "closeness" and "arm's length" supplant "insider status." They do not; instead, they are legal measures used to determine the existence of insider status. If additional analysis is needed to determine their parameters, that analysis is legal, not factual. As Justice Thomas summarized the principle, "[i]n general, we have

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6. As much as Petitioner disagrees with the lower courts' findings of good faith, that factual determination is not at issue here.

treated district-court determinations as 'analytically more akin to a fact' the more they pertain to a simple historical fact of the case, and as 'analytically more akin to . . . a legal conclusion' the more they define rules applicable beyond the parties' dispute." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 845 (2015) (Thomas, J., dissenting) (quoting *Miller v. Fenton*, 474 U.S. 114, 116 (1985)).

Just because an issue is subsidiary to the insider "test" does not make it factual. The character of an issue, not its location on a hierarchical ladder, decides whether the issue is predominantly legal or factual. Here, "close relationship" and "arm's length" are themselves normative components of non-statutory insider status. Unlike intent, they are not subjective, but, rather, characterize an objective state or condition that applies uniformly to a group sharing discrete common characteristics. Those characteristics are objective norms that typically are treated as quasi-legal and reviewed *de novo* to ensure consistency of application. For example:

- **ERISA fiduciary status**: *LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (agreeing with other circuits that "'[t]he existence of a fiduciary relationship under ERISA, on the merits, is a mixed question of law and fact'" and applying *de novo* review) (citations omitted).

- **Employee status under FLSA**: *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("review of the ultimate question of employment status is *de novo*") (citations omitted).

- **Employee status under the Jones Act**: *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 213 (3d Cir. 1993) ("employer-employee status is sometimes, as here, a mixed question of law and fact" and district court's selection of the standard by which employment status is judged is reviewed *de novo*).

- **Borrowed employee status under the LHWCA**: *Gaudet v. Exxon Corp.*, 562 F.2d 351, 358 (5th Cir. 1977) ("the issue [of whether a worker is a borrowed employee under the LHWCA] is best considered an issue of law").

- **American Indian status under 18 U.S.C. § 1152**: *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (holding that determination of victim's American Indian status is a mixed question of law and fact reviewed *de novo*).

The Government agrees that appellate courts should decide "'the norms and standards that give meaning'" to a statutory test. Gov't Br. 16 (quoting Pet'r's Br. 47). Thus, even under the Government's view, the determination of whether co-habitation or commingling of finances should govern whether a transaction is "arm's length" or a relationship is "close" is quasi-legal because it ascribes norms for distinguishing among diverse facts. Because the determination of whether a transaction is "arm's length" requires more than simply answering the "who, what, when, and why" of the transaction, *see* Resp't Br. 23, that determination is normative, not factual. In other words, where the question addresses what "implications [may] be drawn from the facts," and not just what are the facts, *de novo* review should be applied. *Gaudet*, 562 F.2d at 358.

C. Respondents Mischaracterize the Bankruptcy Court's Decision.

Respondents misinterpret the Bankruptcy Court's explanation of its ruling. The Bankruptcy Court stated that it had reviewed other court decisions, identified five pertinent factors (including cohabitation and commingling of finances), and found them all lacking here. J.A. 153-154. This is the epitome of developing and applying a legal test.

Each factor identified by the Bankruptcy Court goes to measuring the "closeness" of Rabkin and Bartlett's personal relationship, not to applying the Ninth Circuit "arm's-length" test of whether the transaction was conducted as if the parties were strangers. Deciding whether Rabkin and Bartlett cohabitated or shared finances does not bear on whether they conducted their transaction as if they were strangers, raising a *legal* question as to whether the Bankruptcy Court applied the Ninth Circuit test.[7]

In response, Respondents argue that (i) the Panel majority found that the Bankruptcy Court adequately explained why the transaction was arm's length and the Panel majority would have reversed had the wrong standard been applied; (ii) the Bankruptcy Court identified the five factors merely as relevant facts and did not create a legal test; (iii) the Bankruptcy Court considered other factors, such as intent; and (iv) the Panel majority distinguished between legal issues, which it

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7. The Bankruptcy Court referenced these as "relationship" factors, suggesting that they were intended to apply to the "closeness" test, not the arm's-length test. J.A. 153.

reviewed *de novo*, and factual issues, which it reviewed for clear error. Resp't Br. 24-25; Gov't Br. 24-27. The record says otherwise: the Panel majority never explained how these five "facts" met the Panel majority's definition of arm's length, and it expressly applied clear-error review, not *de novo* review, to the Bankruptcy Court's ruling. *See* Pet. App. 16a.

The Bankruptcy Court was transparent regarding its analysis. To reiterate, when the court took the bench to announce its decision, it stated:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it.
>
> I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-154. This is a legal analysis, as it (i) expressly determined which factors were relevant, and (ii) did not resolve the factual question of whether the parties had conducted the transaction as if they were strangers. Thus, the Panel majority misperceived the Bankruptcy Court's analysis as factual when it actually was legal.

The Bankruptcy Court subsequently made separate findings as to issues of (a) control (one of the "close relationship" factors), and (b) bad faith, *after* the court had already rejected insider status. *See* Pet. App. 67a. When Respondents point to these factors as supporting the Bankruptcy Court's ruling that Rabkin was not a non-statutory insider, *see* Resp't Br. 6, 13, 21 n.7, Gov't Br. 15, 24, they engage in the very *de novo* review of the full record that they insist is precluded by Rule 52. Respondents' arguments literally prove too much.

D. The Ninth Circuit Did Not Review Legal Aspects of the Bankruptcy Court's Findings *De Novo*.

Respondents' assertion that the Panel majority reviewed *de novo* every "legal" issue that was before it, Resp't Br. 17, Gov't Br. 24-25, is wrong. The Panel majority expressly stated that it reviewed the Bankruptcy Court's findings on *this* issue for clear error and affirmed on that basis: "The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous." Pet. App. 16a.

E. The Government Mischaracterizes the Case Law.

The Government touts several cases that reviewed "arm's length" findings in other contexts and applied clear-error review, *see* Gov't Br. 19-20, but, in those cases, the issue was a routine factual question of whether a particular understanding of "arm's length" or related issues had been met. Unlike this case, no dispute existed as to what was meant by "arm's length." *See, e.g., Lardas*

v. Grcic, 847 F.3d 561, 568 (7th Cir. 2017) (applying clear-error review to whether debtors "were 'good faith purchasers'" under 11 U.S.C. § 363(m), whose parameters were not disputed), *cert. pet. pending*, No. 16-1508 (filed June 19, 2017); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (reviewing for clear error a finding that settlement agreement was negotiated at arm's length; no dispute as to test or relevant factors); *McGee v. O'Conner (In re O'Connor)*, 153 F.3d 258, 261 (5th Cir. 1998) (cursorily addressing facts without discussing test or relevant factors); *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 840 (10th Cir. 1996) (describing a "major issue of fact as to whether" an individual "was in an arm's length relationship" with his insurer; no dispute as to test or relevant factors); *Allen v. Comm'r*, 925 F.2d 348, 351-52 (9th Cir. 1991) (affirming finding that transaction was not arm's length; no legal issue was raised as to test or relevant factors).

II. Respondents Advance the Wrong Analysis for Deciding Mixed Questions of Fact and Law.

As for the broader issue of how mixed questions of fact and law should be resolved, Respondents contend that, unless the issue is purely legal, it is factual and reviewed for clear error. This binary approach ignores the broad middle ground in which a general and abstract term, especially a statutory term, requires further guidance because objective factors have not yet been fleshed out by case law. Under this Court's precedents, that process is predominantly legal and therefore subject to *de novo* appellate review.

A. *Teva* Supports *De Novo* Review.

Reading the Government's brief, one might think that *Teva v. Sandoz* is dead-on authority for Respondents. Far from it. Contrary to the Government's view, *Teva* acknowledges considerable flexibility in mixed-question analysis. The decision, which held that subsidiary factual questions in patent construction are reviewed for clear error, took pains to distinguish ambiguities in written instruments like patents from statutory questions where consistency is required as a matter of public policy. Justice Breyer's majority opinion acknowledged that "this Court has never previously compared patent claim construction . . . to statutory construction." *Teva*, 135 S. Ct. at 840. Although *Teva* was a divided decision, the full Court agreed on this point. *See id.* (Breyer, J., majority) ("Neither do we find factfinding in this [patent construction] context sufficiently similar to the factfinding that underlies statutory interpretation. Statutes, in general, address themselves to the general public; patent claims concern a small portion of that public."); *id.* at 845 (Thomas, J., dissenting) ("The classic case of a written instrument whose construction does *not* involve subsidiary findings of fact is a statute.") (emphasis in original).

A key dispute in *Teva* involved the meaning of an ambiguous patent claim term that was the subject of competing expert opinions. *See id.* at 842-43. As Justice Breyer explained, resolution of competing expert opinions on the meaning of a patent claim is a factual determination, not an issue of law. *Id.* Here, by contrast, the meaning of "arm's length" in the context of the Bankruptcy Code cannot be the subject of expert testimony because it addresses a statutory standard, not

a term of art subject to interpretation by those skilled in the art. As the majority opinion states, "[s]tatutes typically (though not always) rest upon congressional consideration of general facts related to a reasonably broad set of social circumstances; patents typically (though not always), rest upon consideration by a few private parties, experts, and administrators of more narrowly circumscribed facts related to specific technical matters." *Id.* at 840. Generally-applicable determinations thus should be reviewed *de novo*, and case-specific determinations reviewed for clear error. Justice Breyer analogized to *Fenton*, where a district court's determination of the voluntariness of a confession was determined to be a factual determination when it involved a historical fact as to "'whether in fact the police engaged in the intimidation tactics alleged by the defendant.'" *Id.* at 842 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)). Neither *Teva* nor *Fenton* suggest that the standards for assessing voluntariness also are issues of fact and reviewed deferentially.

In sum, nothing in *Teva* remotely suggests that mixed questions of fact and law regarding a statutory status are factual because they involve subsidiary issues. The Government's reliance on *Teva* is misplaced.

B. This Court Has Consistently Applied *De Novo* Review to Intermediate-Level Questions That Are Predominantly Legal.

Respondents' mistaken reliance on *Teva* demonstrates their broader error: they assume that all subsidiary components of "arm's length" status are factual merely because they are subsidiary factors and are not expressly identified in the statute or legislative history. But an

issue does not become factual merely because of its lower rung on some imaginary hierarchical ladder. If the subject is predominantly legal in nature, it is legal, and here the question turns on selection of the relevant underlying *factors*, and not upon determination of the underlying *facts*, which, it bears repeating, essentially are undisputed. That question of relevance makes the analysis predominantly legal. *See, e.g.*, *Teva*, 135 S. Ct. at 845 (Thomas, J., dissenting) (summarizing *Fenton*'s conclusion that "the more [trial-court decisions] define rules applicable beyond the parties' dispute," the more they are "'analytically more akin to . . . a legal conclusion'") (citation omitted).

As Petitioner's opening brief demonstrates, the Court's "seaman" status decisions confirm that intermediate-level questions of statutory interpretation are legal in nature even where the test in question is not explicitly set forth in the statute or legislative history. In response, Lakeridge shrugs off the issue in a cryptic footnote, cursorily distinguishing the seaman cases as "involv[ing] challenges to the *meaning of the statutory standard*." Resp't Br. 30 n.12 (emphasis in original). But the question here *does* involve the meaning of a statutory standard (insider status under the Bankruptcy Code) and thus is not distinguishable on that basis. As for the Government, its short response amplifies the same error: it quotes a seaman case as acknowledging that the courts "'define the appropriate standard'" (reviewed *de novo*) and the jury "find[s] the facts [that are] relevant under the standard." Gov't Br. 13 (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995)). This is exactly Petitioner's point.

In light of the short shrift given by Respondents to the seaman cases, it bears repeating: these cases involve the same type of intermediate subsidiary-level standards clarifying the contours of a legal status as does this case. For example, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), construed "seaman" status, an undefined term in the Jones Act, as a matter of law to apply to "vessels in navigation," a term that was not in the statute, which the Court then construed as requiring, as a matter of law, "that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission,'" such that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at 355. These intermediate-level standards were determined as a matter of law, and only then would the jury decide whether the relevant facts were present. *See Chandris*, 515 U.S. at 369; *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 87-88 (1991); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-14 (1986).

The seaman cases are hardly unique. Circuit courts also review *de novo* the trial courts' determination of the relevant factors for consideration when applying statutory terms. *See, e.g., A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000) (applying *de novo* review to district court's selection of its own factors to determine "likelihood of confusion" under the Lanham Act, as "legal principles govern what evidence may, or must, be considered by the District Court in reaching [its factual] conclusion, and also what standards apply to its determination"); *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.)*, 118 F.3d 635, 638 (9th Cir. 1997) (noting that, in the context of determining

whether the purchase of bankruptcy claims were in good faith, "[t]o the extent that our review requires us to define the general parameters of a good faith determination, we are reviewing a question of law"); *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (explaining that, for mixed questions, "[w]e accept the trial court's finding of historical or narrative facts unless clearly erroneous, but exercise 'plenary revenue of the trial court's choice and interpretation of legal precepts and . . . application of those precepts to historical facts'") (citation omitted).

C. Each of the Court's Four Tests Supports *De Novo* Review.[8]

1. Predominantly Legal Question Test.

The most crucial gap in the briefing is Respondents' failure to explain why the Bankruptcy Court's selection of factors to decide arm's length status—*i.e.*, determining which factors are relevant—is predominantly factual and not normative. Moreover, Respondents never account for the fact that this issue arises in the context of determining the contours of an undefined statutory status.[9] And they

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8. Lakeridge's argument that only a single test exists, with multiple dimensions, Resp't Br. 26 n.10, is largely a semantic quibble. The Court has used these different approaches on various occasions, and it has never renounced any of them.

9. Majority-rule circuit cases refer to the statutory context as a rationale for reviewing non-statutory insider status *de novo*. *See In re U.S. Med., Inc.*, 531 F.3d 1272, 1275 (10th Cir. 2008) ("Here, however, the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts *against the backdrop of a statute*; thus, we have a mixed question of law and

do not address the fact that neither their analysis nor the Bankruptcy Court's discussion correlates with the Panel majority's stated definition for arm's length. Indeed, the core premise of their argument (*i.e.*, that intent and motivation are relevant factors) itself raises a *legal* question. If Respondents are correct that intent played a major role in the Bankruptcy Court's decision, this would provide a compelling example of why *de novo* review is required. Surely, the appellate courts, not individual bankruptcy courts, should decide whether subjective intent can decide insider status.

2. Historical Test.

Respondents' historical analysis fails in multiple ways. First, their comparison of the majority-rule decisions[10] supporting *de novo* review of non-statutory insider status to the minority-rule decisions fails to account for

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fact where the legal analysis predominates.") (emphasis added); *accord Schubert v. Lucent Techs. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009); *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1077 (10th Cir. 2007) ("Because *the basic issue here is one of interpretation of the bankruptcy statutes* and there are no disputed issues of fact, . . . our standard of review is *de novo*.") (emphasis added).

10. Contrary to Lakeridge's contention that no majority rule has emerged, not only do the majority of circuits to address the issue favor *de novo* review, but three Bankruptcy Appellate Panel cases have so ruled as well. *See Stalnaker v. Gratton (In re Rosen Auto Leasing, Inc.)*, 346 B.R. 798, 803 (B.A.P. 8th Cir. 2006); *Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners, Inc.)*, 319 B.R. 626, 630 (B.A.P. 9th Cir. 2004); *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586 n.1 (B.A.P. 9th Cir. 1987).

extensive discussion in one of the earlier majority-rule decisions, *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996). Second, it ignores the more general historical practice of treating mixed questions of "status," statutory construction, and intermediate-level undefined statutory terms as predominantly legal requiring *de novo* review. Third, Lakeridge repeatedly, but wrongly, declares that this Court has never applied *de novo* review outside of a constitutional context, Resp't Br. 18, 26, 27-29, ignoring *Wilander* and the other cases that have done just that, not to mention *Teva*, which draws the line at statutory vs. non-statutory issues, and *not* at constitutional issues. Finally, Respondents' analysis does not comport with the view of Justices Thomas and Alito that the proper historical timeframe is 1937, when Rule 52(d) was adopted. *See Teva*, 135 S. Ct at 845 (Thomas, J., dissenting). At that time, this Court applied *de novo* review to determinations of ultimate fact. *See Bogardus v. Comm'r*, 302 U.S. 34, 38-39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937). *De novo* review thus is the historical practice, for multiple reasons.

3. Functional Test.

In arguing that trial courts are best suited to decide insider status, Respondents again rely on the faulty premise that the question at hand is factual. If that were the case, their functional analysis would have some validity. But the question here is the need for appellate guidance as to how the trial courts should apply a statutory test, not the determination of historical facts under that test. Neither brief addresses the fundamental problem that the characteristics of non-statutory insider status should not vary from one courtroom to the next.

The need for consistent standards is obvious. Not only does the Constitution require uniformity of bankruptcy laws, *see* U.S. CONST. art. I, § 8, cl. 4, but allowing jurisdiction-specific or even judge-specific tests as to whom is an insider is not tenable: as discussed *infra*, it would lead to an arbitrary world where the standards for liability for preferential and fraudulent transfers would depend on the court hearing the case. This is a paradigm case for *de novo* review.

4. Ultimate-Issue Test.

As discussed above, Justices Thomas and Alito's historical analysis makes the Court's fourth test, determinations of ultimate facts, also applicable here.

III. Respondents Ignore the Untenable Consequences from Allowing Disparate Standards for Non-Statutory Insider Status.

Respondents err twice in their discussion of impact. First, they mistakenly posit a world where appellate courts would be saddled with torrents of appeals requiring *de novo* resolution of factual disputes. That dystopian scenario reflects a vivid imagination, not anything that could result here. Second, they never try to justify why allowing widely disparate rulings as to the legal characteristics of a non-statutory insider is an acceptable outcome. For multiple reasons, it is not.

Respondents' projection of dire consequences suffers from the same faulty logic as do their other arguments: they erroneously assume that *de novo* review means that all subsidiary factual determinations would be made by

appellate courts. The issue here is how a legal standard should be applied to the facts and what factors are relevant for that analysis. Appellate courts routinely make such decisions, and they are far less fact-intensive, than, say, reviewing a factual decision for clear error. Respondents' floodgates argument is meritless.

But a real detrimental impact *will* result if Respondents prevail. The Court need look no further than the cases finding insider status despite relationships that are more attenuated than cohabitation, commingling of finances, and the other factors cited by the Bankruptcy Court. In those cases, close friends, non-cohabitating lovers, golfing buddies, business associates, former spouses, and others have been ruled to be non-statutory insiders. *See Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011-12 (5th Cir. 1992) (former spouse and friend); *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (debtor's former lover was an insider even though relationship ended before the transfer); *Gordon v. Vongsamphanh (In re Phongasavath)*, 328 B.R. 895, 897-98 (Bankr. N.D. Ga. 2005) (friend making undocumented loans but no *de facto* family relationship, romantic involvement, or cohabitation); *Hirsch v. Tarricone (In re A. Tarricone, Inc.)*, 286 B.R. 256, 269 (Bankr. S.D.N.Y. 2002) (golfing buddy and close personal friend); *In re Curry*, 160 B.R. 813, 818 (Bankr. D. Minn. 1993) (very close friend and business associate); *Rush v. Riddle (In re Standard Stores, Inc.)*, 124 B.R. 318, 325 (Bankr. C.D. Cal. 1991) (ex-brother-in-law); *Grant v. Podes (In re O'Connell)*, 119 B.R. 311, 316 (Bankr. M.D. Fla. 1990) (very good friend who made informal loans); *accord Castellani v. Kohne (In re Kucharek)*, 79 B.R. 393, 395-96 (Bankr. E.D. Wis. 1987). Respondents cite no other case that has drawn a

line requiring cohabitation and commingled finances, *inter alia*, to establish insider status.

This disparity in outcomes means that, under Respondents' position, a transferee might be liable for avoidance of preferential or fraudulent transfers in some courts but not in others. Plan confirmation fights, objections to discharge, avoidance actions, claims disallowance and subordination, and even insider transactions subject to state-law challenges also would be affected.

Respondents' silence here is telling. If a transferee can be liable for a preferential or fraudulent transfer based merely upon the debtor's discretionary decision of where to file a petition for bankruptcy (bankruptcy cases do not have personal-jurisdiction restraints due to nationwide service of process), constitutionally required uniform application of bankruptcy law is at risk. Surely a transferee should be able to understand her status and potential exposure when a transfer or payment is made, not months later when the debtor elects where to file for bankruptcy protection.

Appellate review is supposed to prevent wide disparity in legal standards and outcomes. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991) (discussing "the goal of doctrinal coherence advanced by independent appellate review"). Requiring appellate courts to apply *de novo* review here will simply let them do their jobs.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for *de novo* review of the Bankruptcy Court's decision.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL.,
PETITIONERS

v.

THE VILLAGE AT LAKERIDGE, LLC, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Bankruptcy Code, 11 U.S.C. 101 *et seq.*, contains a non-exhaustive list of persons and entities who are considered "insiders" under the Code. Creditors who do not fall within any of the enumerated categories but have a comparably close relationship to the debtor may likewise be treated as insiders. The Code provides that, before a Chapter 11 plan of reorganization may be approved, at least one class of impaired claims must vote in favor of the plan, determined "without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). The question presented is as follows:

Whether a bankruptcy court's determination of insider status with respect to a particular claimholder should be reviewed de novo or for clear error.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
A bankruptcy court's articulation of the legal standard for assessing "insider" status is reviewed de novo, but the court's factual findings are reviewed for clear error 11
A. Where possible, appellate courts should distinguish overarching legal questions from subsidiary factual questions 11
B. A trial court's determination whether a particular person has "insider" status under the Bankruptcy Code involves both legal and factual components, with separate standards of review for each 15
C. The court of appeals articulated and applied the correct standard of review in this case 24
Conclusion 29

TABLE OF AUTHORITIES

Cases:

Allen v. *Commissioner*, 925 F.2d 348 (9th Cir. 1991) 20
Anderson v. *City of Bessemer*, 470 U.S. 564 (1985) 9, 12
Baumgartner v. *United States*, 322 U.S. 665 (1944) 14
Chandris, Inc. v. *Latsis*, 515 U.S. 347 (1995) 12, 13, 16
Commissioner v. *Duberstein*, 363 U.S. 278 (1960) 21
Commissioner v. *Wemyss*, 324 U.S. 303 (1945) 18
Cooper v. *Harris*, 137 S. Ct. 1455 (2017) 21
D'Amato v. *Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) 20
Florida Fund of Coral Gables, Ltd., In re, 144 Fed. Appx. 72 (11th Cir. 2005) 19

Cases—Continued: Page

Ford v. *Allied Mut. Ins. Co.*, 72 F.3d 836 (10th Cir. 1996) 20
Freidman, In re, 126 B.R. 63 (B.A.P. 9th Cir. 1991) 7
Highmark Inc. v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) 9, 11
Holloway, In re, 955 F.2d 1008 (5th Cir. 1992) 18
Jones v. *Harris Assocs. L. P.*, 559 U.S. 335 (2010) 25
Krueger, In re, 812 F.3d 365 (5th Cir.), cert. denied 137 S. Ct. 314 (2016) 14
Lardas v. *Grcic*, 847 F.3d 561 (7th Cir. 2017), petition for cert. pending, No. 16-1508 (filed June 19, 2017) 20
Marsch, In re, 36 F.3d 825 (9th Cir. 1994) 14
McLane Co. v. *EEOC*, 137 S. Ct. 1159 (2017) 17, 19, 21, 22, 23
Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 18
Miller v. *Fenton*, 474 U.S. 104 (1985) 14, 21
O'Connor, In re, 153 F.3d 258 (5th Cir. 1998) 20
Pepper v. *Litton*, 308 U.S. 295 (1939) 25
Piazza, In re, 719 F.3d 1253 (11th Cir. 2013) 14
Pierce v. *Underwood*, 487 U.S. 552 (1988) 9, 12, 21, 22
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 11, 14, 15, 18, 19
RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*, 566 U.S. 639 (2012) 2, 23
Schuman, In re, 81 B.R. 583 (B.A.P. 9th Cir. 1987) 7
South Beach Sec., Inc., In re, 606 F.3d 366 (7th Cir. 2010) 16
Teva Pharm. USA, Inc. v. *Sandoz, Inc.*, 135 S. Ct. 831 (2015) 10, 12, 13, 14
U.S. Med., Inc., In re, 531 F.3d 1272 (10th Cir. 2008) 15, 16, 17, 19, 26

Cases—Continued: Page

United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 26
United States v. *Seetapun*, 750 F.2d 601 (7th Cir. 1984) 20
W.R. Grace & Co., In re, 475 B.R. 34 (D. Del. 2012) 22
Winstar Commc'ns, Inc., In re, 554 F.3d 382 (3d Cir. 2009) 19

Statutes and rules:

Bankruptcy Code:
Ch. 1, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(31) 3, 4, 7, 15, 21
11 U.S.C. 101(31)(B) 3, 5
11 U.S.C. 102(3) 4
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 303(b)(2) 4
11 U.S.C. 307 1
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 547(b)(4)(B) 4
11 U.S.C. 548(a)(1)(B)(IV) 5
Ch. 7, 11 U.S.C. 701 *et seq.*:
11 U.S.C. 702(a)(3) 4
11 U.S.C. 707(a) 14
11 U.S.C. 727(a)(7) 5
Ch. 11, 11 U.S.C. 1101 *et seq.* 2
11 U.S.C. 1112(b)(4) 14
11 U.S.C. 1121 2
11 U.S.C. 1122 2
11 U.S.C. 1123 2
11 U.S.C. 1124 2
11 U.S.C. 1124(b)(4) 14

Statutes and rules—Continued: Page

11 U.S.C. 1126(c) 3
11 U.S.C. 1126(e) 22, 26
11 U.S.C. 1129(a)(3) 2, 22, 23
11 U.S.C. 1129(a)(7) 2, 23
11 U.S.C. 1129(a)(8)(A) 2
11 U.S.C. 1129(a)(8)(B) 2
11 U.S.C. 1129(a)(10) ..... *passim*
11 U.S.C. 1129(a)(11) 2, 23
11 U.S.C. 1129(b) 2
11 U.S.C. 1129(b)(1) 2, 23
Ch. 13, 11 U.S.C. 1301 *et seq.* 2
11 U.S.C. 1307(c) 14
Jones Act, 46 U.S.C. 30104 13
28 U.S.C. 581-589a 1
Fed. R. Bankr. P.:
Rule 7052 12
Rule 9014(c) 12
Fed. R. Civ. P.:
Rule 52 12
Rule 52(a) 14
Rule 52(a)(6) 12

Miscellaneous:

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Vol. 2 ..... 4, 10
Vol. 5 ..... 15, 17
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S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 4, 15

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INTEREST OF THE UNITED STATES

The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees throughout the country. 28 U.S.C. 581-589a. United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena," H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977), and they "may raise and may appear and be heard on any issue in any case or proceeding under" Title 11, 11 U.S.C. 307. The United States is also the largest creditor in the Nation, frequently appearing as creditor in Chapter 11 cases. Finally, as a frequent litigant in the federal courts, the United States has a strong interest in the correct application of standards of appellate review.

At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Chapter 11 of the Bankruptcy Code (Code) provides for the reorganization of financial obligations of a business enterprise or individual. 11 U.S.C. 1101 *et seq.* Chapter 11 bankruptcies are implemented according to a "plan" (usually, but not always, filed by the debtor, 11 U.S.C. 1121) that assigns to "classes" the various allowed claims against the debtor and specifies the treatment each class of claims shall receive, 11 U.S.C. 1122, 1123. A court generally may confirm a proposed Chapter 11 plan only if each class of creditors "has accepted the plan" or "is not impaired under the plan." 11 U.S.C. 1129(a)(8)(A) and (B); see 11 U.S.C. 1124. The proposed plan must also satisfy more than a dozen other statutory requirements, including that the plan "has been proposed in good faith," that objecting creditors will fare at least as well in reorganization as they would in liquidation, and that the plan is feasible. 11 U.S.C. 1129(a)(3), (7) and (11).

In certain circumstances, the Code authorizes confirmation of a plan that impairs the claims or interests of a non-consenting class of creditors. 11 U.S.C. 1129(b). Such a plan is commonly known as a "cramdown" plan. See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 641-642 (2012). In order to be confirmable over the objection of an impaired class, a cramdown plan must "not discriminate unfairly" and must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. 1129(b)(1). The Code further provides that such a plan may be confirmed only if "at least one class of claims that is impaired under the

plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10).

For purposes of Section 1129(a)(10), "[a] class of claims has accepted a plan if such plan has been accepted by creditors * * * that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors * * * that have accepted or rejected such plan." 11 U.S.C. 1126(c). When a class of claims contains only one creditor, that creditor (if he is a non-insider) may decide whether to accept or reject a plan. *Ibid.* When a class of claims contains multiple creditors, only the votes of non-insider creditors may be considered in determining whether the class has accepted a proposed plan. 11 U.S.C. 1129(a)(10). The question presented in this case concerns the standard of review that applies to a bankruptcy court's determination that a particular creditor is or is not an "insider" for purposes of Section 1129(a)(10).

b. The Bankruptcy Code contains a non-exhaustive list of persons and entities with "insider" status. 11 U.S.C. 101(31). Persons or entities falling into one of the categories enumerated in Section 101(31) are commonly called "statutory insiders." Pet. App. 9a. Where, as here, the debtor is a corporation, "[t]he term 'insider' includes * * * (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. 101(31)(B).

Because the statutory definition of "insider" states that the term "includes" persons within the enumerated categories, it leaves open the possibility that other

persons will be insiders in particular circumstances. 11 U.S.C. 101(31); see 11 U.S.C. 102(3) (providing that the terms "'includes' and 'including' are not limiting" in the Bankruptcy Code). Congress left the definition of "insider" somewhat "open ended because the term is not susceptible of precise specification." H.R. Rep. No. 595, 95th Cong. 1st Sess. 314 (1977) (House Report). As a result, other persons and entities can be "non-statutory insiders," or insiders not listed in Section 101(31). Pet. App. 9a. Such persons have "a sufficiently close relationship with the debtor that [their] conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978) (Senate Report); House Report 312; see 2 *Collier on Bankruptcy*, ¶ 101.31, at 101-142 (Allen N. Resnick & Henry J. Sommer, eds., 16th ed. 2016) (*Collier*) (explaining that "a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length") (citation omitted).

Under the Bankruptcy Code, dealings between an insider and a corporate debtor are subject to particularly close scrutiny. See 2 *Collier* ¶ 101.31, at 101-140 ("An 'insider' generally is an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny."). The Code also bars insiders from exercising some of the prerogatives that other creditors possess. In a Chapter 7 case, for example, an insider is not permitted to vote for a candidate for trustee. 11 U.S.C. 702(a)(3). Insider status is also a factor in determining whether a sufficient number of creditors have joined together to initiate an involuntary bankruptcy, 11 U.S.C. 303(b)(2); whether a pre-petition transfer may be avoided, 11 U.S.C.

547(b)(4)(B), 548(a)(1)(B)(IV); and whether certain debts may be discharged in a Chapter 7 bankruptcy, 11 U.S.C. 727(a)(7).

2. Respondent[1] is a limited liability corporation with only one member, MBP Equity Partners 1, LLC (MBP). Pet. App. 3a. MBP is managed by a board of five members, one of whom is Kathy Bartlett. *Ibid.* MBP and Bartlett are both statutory insiders of respondent. *Id.* at 16a. Bartlett "shares a close business and personal relationship" with Robert Rabkin, "which is unrelated to Bartlett's position with MBP." *Id.* at 3a. The parties dispute whether Rabkin is also an insider of respondent.

In June 2011, respondent filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. Pet. App. 3a. At that time, respondent had two creditors: Petitioner held a fully secured claim of approximately $10 million, and MBP held an unsecured claim of approximately $2.76 million. *Ibid.* In September 2011, respondent filed a proposed plan of reorganization that would impair both claims. See C.A. E.R. 340, 347-351, 379-383. Because petitioner did not consent to the proposed plan, see *id.* at 578-579, the plan could not be confirmed unless another non-insider class that would be impaired by the plan voted to accept the plan. See 11 U.S.C. 1129(a)(10). But the only claim in the only other class was held by MBP, a statutory insider. See 11 U.S.C. 101(31)(B). In the absence of a confirmable plan, respondent would have been liquidated, and MBP

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[1] Although the case caption on this Court's docket indicates that there are multiple petitioners and respondents in this case, petitioner's brief indicates (Br. ii) that U.S. Bank National Association is the sole petitioner and that The Village at Lakeridge, LLC is the sole respondent. In this brief, we refer to those parties as petitioner and respondent, respectively.

would have had little hope of recovering on its unsecured claim or on its ownership of respondent. See Pet. App. 20a-21a.

Acting on behalf of MBP's board, Bartlett approached Rabkin and offered to sell him MBP's $2.76 million claim for $5000. Pet. App. 4a. Rabkin agreed to the proposal without negotiating the price or investigating what the claim might be worth. *Id.* at 4a, 19a-20a. Petitioner then moved to designate Rabkin's claim as an insider claim and to disallow it for voting purposes. *Id.* at 5a. While the motion was pending, petitioner voted to reject respondent's proposed reorganization plan, and Rabkin voted to accept it. J.A. 95-102.

3. After holding an evidentiary hearing, the bankruptcy court granted petitioner's motion to disallow Rabkin's vote. Pet. App. 61a-70a. The court concluded that Rabkin was a statutory insider because, "as the assignee of the claim," he had "acquired the same status as" statutory insider MBP when he purchased MBP's claim. *Id.* at 67a.

By contrast, the bankruptcy court concluded that Dr. Rabkin was not a non-statutory insider. "[A]mong other things," the court found that:

> (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay [D]r. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

Pet. App. 66a. The court further found that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith

to create an impaired, consenting class for purposes of cramdown." *Id.* at 67a.

4. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed in part and reversed in part. Pet. App. 28a-60a.

The panel rejected the bankruptcy court's conclusion that Rabkin was a statutory insider. It held that he did not fall within any of the categories enumerated in the statutory definition, Pet. App. 39a-41a; see 11 U.S.C. 101(31), and that the assignee of an insider claim does not automatically become a statutory insider by virtue of the assignment, Pet. App. 45a-48a.

The panel upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. Pet. App. 41a-44a. The panel noted that "a non-statutory insider is one 'who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.'" *Id.* at 41a (quoting *In re Freidman*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991)). That closer scrutiny, the panel explained, requires an assessment of whether "the creditor 'exercises such control or influence over the debtor as to render their transaction not arms-length.'" *Id.* at 42a (quoting *In re Schuman*, 81 B.R. 583, 586 (B.A.P. 9th Cir. 1987)). The panel concluded that, "[w]hile others might come to a different conclusion," the bankruptcy court had not clearly erred in finding on the basis of Rabkin's and Bartlett's testimony that Rabkin was not a non-statutory insider. *Id.* at 44a.

The panel also affirmed the bankruptcy court's finding that Rabkin had voted to accept the plan in good faith. Pet. App. 54a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

a. All three members of the court of appeals panel agreed that "[a] person does not become a statutory insider solely by acquiring a claim from a statutory insider." Pet. App. 10a; see *id.* at 19a. The majority noted that "bankruptcy law distinguishes between the status of a claim and that of a claimant," and it explained that "[i]nsider status pertains only to the claimant." *Id.* at 10a.

A majority of the court of appeals panel then upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. Pet. App. 13a-18a. The court of appeals explained that it reviews de novo "the bankruptcy court's definition of non-statutory insider status, which is a purely legal question," *id.* at 15a n.13, while "review[ing] the bankruptcy court's factual finding for clear error," *id.* at 15a; see also *id.* at 8a. With respect to the legal standard that governs the inquiry into insider status, the court agreed with the bankruptcy court that, in assessing whether a creditor is a non-statutory insider, "[a] court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length." *Id.* at 14a. The majority also held that the bankruptcy court had not clearly erred in concluding that neither Rabkin's relationship with respondent nor Rabkin's relationship with Bartlett was "sufficiently close to compare with any category listed in § 101(31)." *Id.* at 16a. The majority further held that the bankruptcy court had not clearly erred in concluding that the sale of MBP's claim to Rabkin had been conducted at arm's length. *Id.* at 17a n.15.[2]

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[2] In response to the dissent's conclusion that Rabkin was a non-statutory insider, the majority explained that "[t]he dissent did not preside over the evidentiary hearing and did not hear the evidence

Judge Clifton dissented from the court of appeals' conclusion that Rabkin was not a non-statutory insider. Pet. App. 19a-27a. Although Judge Clifton agreed with the legal criteria used by the majority to identify non-statutory insiders, he suggested that the bankruptcy court had applied an incorrect legal test. *Id.* at 24a. In any event, he would have held that the bankruptcy court had clearly erred in concluding that Rabkin's acquisition of the claim was negotiated at arm's length. *Id.* at 24a-25a; see *id.* at 19a-22a. Judge Clifton concluded that "the only logical explanation for Rabkin's actions here" was that Rabkin "did a favor for a friend." *Id.* at 21a. Although Judge Clifton agreed that the bankruptcy court's analysis of the relationship between Rabkin and Bartlett "would support a finding that Rabkin and Bartlett are separate financial entities," in his view it would "not show that this transaction was conducted" at arm's length. *Id.* at 23a.

b. In a separate memorandum decision, the court of appeals affirmed the Bankruptcy Appellate Panel's judgment that the bankruptcy court did not clearly err in finding that Rabkin had voted in good faith. J.A. 156-160.

SUMMARY OF ARGUMENT

"Traditionally, decisions on 'questions of law' are 'reviewable *de novo*,' [and] decisions on 'questions of fact' are 'reviewable for clear error.'" *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 558

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in person," and that the court of appeals "cannot substitute its judgment for that of the bankruptcy court 'simply because it is convinced that it would have decided the case differently.'" Pet. App. 16a n.14 (quoting *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573 (1985)); see *id.* at 17a n.16.

(1988)). Although a particular question may contain both legal and factual components, "[c]ourts of appeals have long found it possible to separate factual from legal matters" and to apply the appropriate standard of review to each. *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015).

That is the appropriate course here. Petitioner contends (Br. 29-34) that, because the Bankruptcy Code does not comprehensively define the term "insider," the application of that term is necessarily a mixed question of law and fact reviewed de novo. But petitioner's argument elides the discrete factual and legal components that may be at issue in any given appeal. When a trial court gives content to an undefined (or partially defined) statutory term and an appeal is subsequently taken, the appellant's challenge to the court's statutory construction presents a pure legal question that the appellate court reviews de novo. But if application of the correct legal standard requires subsidiary factual findings, those findings are reviewed for clear error, even if they are "nearly dispositive" in a particular case. *Teva Pharm.*, 135 S. Ct. at 842.

A widely accepted definition of non-statutory insider status—which this Court did not grant certiorari to review—states that "a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length." 2 *Collier* ¶ 101.31, at 101-142. Under that definition, a trial court's finding that a transaction was or was not conducted at arm's length is a factual question. It involves an inquiry into the parties' motivations: Did each act pursuant to its own commercial interests, or did their relationship introduce external considera-

tions? Consistent with this Court's longstanding recognition that "[t]reating issues of intent as factual matters for the trier of fact is commonplace," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982), appellate courts have reviewed arm's-length determinations for clear error both within and outside the bankruptcy context.

The court of appeals correctly articulated the applicable standards of review in this case. It first reviewed "de novo" the bankruptcy court's "definition of non-statutory insider status." Pet. App. 8a. The court of appeals concluded that, notwithstanding the bankruptcy "court's failure to use the words 'arm's length transaction,'" the bankruptcy court had properly analyzed whether the transaction was "conducted at arm's length." *Id.* at 17a n.15. Next, the court of appeals reviewed the factual record that the bankruptcy court had considered, *id.* at 16a-18a, and held that the bankruptcy court had not clearly erred in finding that Rabkin was not a non-statutory insider, *id.* at 18a. Whatever the merits of its view of the record, the court of appeals applied the correct standard of review to each question.

ARGUMENT

A BANKRUPTCY COURT'S ARTICULATION OF THE LEGAL STANDARD FOR ASSESSING "INSIDER" STATUS IS REVIEWED DE NOVO, BUT THE COURT'S FACTUAL FINDINGS ARE REVIEWED FOR CLEAR ERROR

A. Where Possible, Appellate Courts Should Distinguish Overarching Legal Questions From Subsidiary Factual Questions

1. "Traditionally, decisions on 'questions of law' are 'reviewable *de novo*,' [and] decisions on 'questions of fact' are 'reviewable for clear error.'" *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748

(2014) (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988)). Determining the proper standard of review thus requires precise identification of the particular question raised on appeal. Where "statutory terms are at issue, their interpretation is a question of law" that must be reviewed de novo. *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 369 (1995). But where the application of a statute turns on the underlying facts, a trial court's factual findings, "like all other factual determinations, must be reviewed for clear error." *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015).

Rule 52(a)(6) of the Federal Rules of Civil Procedure, which applies in many bankruptcy proceedings, provides without exception that "[f]indings of fact * * * must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); see Fed. R. Bankr. P. 7052 (applying Federal Rule of Civil Procedure 52 to adversary proceedings in bankruptcy); Fed. R. Bankr. P. 9014(c) (applying Federal Rule of Bankruptcy Procedure 7052 to motions in contested matters, except where otherwise provided). Thus, across a variety of contexts, "review of factual findings under the clearly-erroneous standard —with its deference to the trier of fact—is the rule, not the exception." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 575 (1985); see *Teva Pharm.*, 135 S. Ct. at 837 (explaining that, when they review the findings of a "district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*") (citation omitted).

2. Petitioner asserts (Br. 29-34) that "insider" status under the Bankruptcy Code is a single mixed question of law and fact and is thus reviewed de novo. The need

for courts to define and apply a legal standard as part of their analysis, however, does not transform all subsidiary factual findings into legal conclusions. Nor does it require that the entire dispute be reviewed de novo. To the contrary, "[c]ourts of appeals have long found it possible to separate factual from legal matters." *Teva Pharm.*, 135 S. Ct. at 839.

This Court has taken care to distinguish overarching legal questions from subsidiary factual ones, particularly when an appeal focuses on only one type of question. The Court recently determined, for example, that a dispute about the meaning of a patent claim raises a question of law that an appellate court reviews de novo, while any subsidiary factual questions that may arise during claim construction are reviewed for clear error. See *Teva Pharm.*, 135 S. Ct. at 837-838. Similarly, to borrow petitioner's example (Br. 40-41), the Court has held that the definition of the Jones Act term "seaman," 46 U.S.C. 30104, is a legal question, but subsidiary questions such as whether a vessel is "in navigation" are factual. *Chandris*, 515 U.S. at 369, 373. In reaching that conclusion, the Court emphasized that "it is the court's duty to define the appropriate standard," but that a jury could find the facts relevant under that standard. *Id.* at 369.

The bankruptcy context is no different. In a variety of circumstances, resolution of an overarching legal question—including resolution of a dispute about the meaning of an undefined or partially defined statutory term—may demand subsidiary factual findings. When reviewing those subsidiary findings, an appellate court should apply the same deferential standard of review that it would apply to any other trial-court factual find-

ing. For example, numerous provisions of the Bankruptcy Code authorize dismissal of a case for "cause," a term for which the Code provides illustrative examples but which it does not exhaustively define. 11 U.S.C. 707(a), 1112(b)(4), 1307(c). Several courts of appeals have explained that a trial court's definition of "cause" is a legal conclusion that is reviewed de novo. See, *e.g.*, *In re Krueger*, 812 F.3d 365, 369-373 (5th Cir.), cert. denied, 137 S. Ct. 314 (2016); *In re Piazza*, 719 F.3d 1253, 1261-1262 (11th Cir. 2013); *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994). But where a trial court has properly defined "cause" to include "bad faith," the trial court's finding of bad faith is reviewed deferentially on appeal. See *Krueger*, 812 F.3d at 374; *Piazza*, 519 F.3d at 1271-1274; *Marsch*, 36 F.3d at 828.

3. Petitioner suggests (Br. 52-53) that a factual finding is ineligible for deferential review if it represents the "ultimate issue" to be decided. That is incorrect. "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate * * * question." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985); see *Teva Pharm.*, 135 S. Ct. at 842 ("Simply because a factual finding may be nearly dispositive does not render the subsidiary question a legal one."); *Baumgartner* v. *United States*, 322 U.S. 665, 670 (1944) ("[A] 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print."). And Federal Rule of Civil Procedure 52(a) "does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).

B. A Trial Court's Determination Whether A Particular Person Has "Insider" Status Under The Bankruptcy Code Involves Both Legal And Factual Components, With Separate Standards Of Review For Each

The well-established principles described above govern the analysis of insider status under Section 1129(a)(10). When an appellate court reviews a trial court's determination concerning a creditor's insider status, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. The critical question is whether, on appeal, the trial court is "faulted for misunderstanding or applying an erroneous definition" or for "arriving at * * * an erroneous [factual] finding." *Pullman-Standard*, 456 U.S. at 287.

1. Petitioner is correct (Br. 19-22) that an appellate court should review de novo the legal test or standard that a trial court articulates for determining whether a particular person is a non-statutory insider.

The enumerated list of "insiders" set forth in Section 101(31) reflects that "[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." House Report 312; Senate Report 25. In determining whether a particular creditor is a non-statutory insider (*i.e.*, a person who should be treated as an insider even though he does not fall within the non-exhaustive list of examples contained in Section 101(31)), courts therefore have "focuse[d] on two factors: (1) the closeness of the relationship between the parties; and (2) whether the transaction was negotiated at arm's length." 5 *Collier* ¶ 547.03[6], at 547-36; see *In re U.S. Med., Inc.*, 531 F.3d 1272, 1277 (10th Cir. 2008) ("The inquiry then is whether there is a

close relationship and whether there is anything other than closeness to suggest that any transactions were not conducted at arm's length.") (emphasis omitted).

Courts' emphasis on the presence or absence of an arm's-length relationship is consistent with the purpose of Section 1129(a)(10). A creditor who is also an insider often has a substantial interest, not necessarily shared by other creditors, in ensuring that a debtor business continues to operate rather than liquidating. As a result, an insider may be willing to accept impairment under a plan of reorganization so that the insider can continue to benefit from the debtor's ongoing operation. Because an insider is in a position to advance its own interests by influencing the drafting of a proposed plan, the degree of impairment it is willing to accept may not reflect the type of arm's-length bargaining that would be reflected in the acceptance of impairment by a non-insider creditor. Excluding an insider's vote ensures that "some disinterested creditors have approved the plan" and limits the "risk of collusion between an insider creditor and the debtor at the expense of other creditors." *In re South Beach Sec., Inc.*, 606 F.3d 366, 378 (7th Cir. 2010); see *U.S. Med.*, 531 F.3d at 1280 ("[I]nsiders do not have interests 'independent' of their debtors whereas parties held to be operating at arm's length necessarily do.") (citation omitted).

How courts frame the legal standard to best capture those conflicted insiders is a question of statutory interpretation and thus a pure question of law. See, *e.g.*, *Chandris*, 515 U.S. at 369. As petitioner correctly observes (Br. 47), "appellate courts are much better situated to decide norms and standards that give meaning and limits for open-ended statutory terms." Thus, when the appellant in a bankruptcy case challenges the legal

test or standard that the trial court applied to determine non-statutory insider status, that challenge should be reviewed de novo on appeal. See Pet. Br. 22; Resp. Br. 30 n.12.[3]

2. At the present stage of the case, the parties' primary disagreement concerns the standard of review to be applied to a subsidiary question: whether the sale of MBP's claim to Rabkin "was negotiated at arm's length." 5 *Collier* ¶ 547.03[6], at 547-36. The bankruptcy court's resolution of that factual question, which depends in part on the parties' intent at the time they consummated the transaction, should be reviewed for clear error. Deferential review is also consistent with the "history of appellate practice," "the sound administration of justice," and other provisions of the Bankruptcy Code. *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1166 (2017) (citation omitted).

a. The basic nature of the arm's-length inquiry counsels in favor of clear-error review. An arm's-length transaction is "[a] transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." *Black's Law Dictionary* 1726 (10th ed. 2014); see *U.S. Med.*, 531 F.3d at 1277 n.4 ("An arm's-length transaction is a transaction in good faith in the ordinary

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[3] The petition for a writ of certiorari in this case raised two legal challenges, which were reviewable de novo on appeal, to the court of appeals' determination that Rabkin was not an insider for purposes of the Bankruptcy Code's cramdown provisions. First, petitioner argued that a person who acquires a claim from an insider automatically takes on insider status. See Pet. 7-19. Second, petitioner argued that the court had applied an incorrect legal test for determining insider status. See Pet. 24-28. This Court denied review on those questions. See J.A. 161.

course of business by parties with independent interests.") (citation, brackets, and internal quotation marks omitted). For purposes of insider status under the Bankruptcy Code, the determination whether two parties bargained at arm's length turns on the parties' *motivations*: Did (and would) the creditor act solely in his own interests, or did (and would) he account for the interests of the debtor? Cf. *Commissioner* v. *Wemyss*, 324 U.S. 303, 306 (1945) (explaining that, for purposes of the gift tax, a transaction "at arm's length" is "free from any donative intent") (citation omitted); see *In re Holloway*, 955 F.2d 1008, 1014 (5th Cir. 1992) (concluding that ex-wife was an insider because her transactions with her ex-husband "were not commercially motivated" and thus "were not conducted at arm's length"). Questions concerning the parties' motives in negotiating a transaction, like other questions of intent, are factual. See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (explaining that the "state of a man's mind is as much a fact as the state of his digestion") (citations omitted); *Pullman-Standard*, 456 U.S. at 288 ("Treating issues of intent as factual matters for the trier of fact is commonplace.").

Petitioner contends that de novo review is nevertheless justified because "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." Pet. Br. 26 (quoting *Pullman-Standard*, 456 U.S. at 289 n.19). But *Pullman-Standard* distinguished that sort of mixed question of law and fact from factual questions of intent. The Court explained that, even where the historical facts regarding the discriminatory effect of a seniority system had been established, the question "whether the differential impact of the seniority system

reflected an intent to discriminate on account of race" remained "a pure question of fact." *Pullman-Standard*, 456 U.S. at 287-288. So too here. Whether a transaction was conducted at arm's length is a *factual* inference drawn from various historical facts, whether or not those historical facts are themselves disputed. Deferential review is particularly appropriate where (as here) the trial court's conclusions as to intent are based in part on live testimony concerning the witnesses' reasons for acting as they did. See Pet. App. 16a n.14 (explaining that the dissenting judge "did not preside over the evidentiary hearing and did not hear the evidence in person").

b. The limited history of relevant appellate practice also supports a deferential standard of review. See *McLane*, 137 S. Ct. at 1167. In deciding whether claimants were non-statutory insiders under the Bankruptcy Code, courts of appeals have treated determinations regarding the arm's-length character of particular transactions as determinations of fact, in the few cases where the issue has arisen. See *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 399-400 (3d Cir. 2009) (declining to "conclude that the Bankruptcy Court's finding that the parties did not deal at arm's length was clearly erroneous"); *In re Florida Fund of Coral Gables, Ltd.*, 144 Fed. Appx. 72, 76 (11th Cir. 2005) (holding that the bankruptcy court did not "clearly err[] in finding that the transactions between the Florida Fund and the Police Fund were not at arm's length"); cf. *U.S. Med.*, 531 F.3d at 1280 (concluding that, "where the bankruptcy court considered a variety of factors and found that all relations between Creditor and Debtor were at arm's length, a ruling that Creditor is a non-statutory insider does not follow") (citation omitted). Although petitioner

points to those decisions and others that describe insider status as a mixed question of law and fact to be reviewed de novo (Br. 31-32), petitioner does not identify any decision that has applied de novo review to the subsidiary question whether a transaction was conducted at arm's length.

Those few examples applying Section 1129(a)(10) are consistent with appellate courts' general approach. In a variety of contexts, courts of appeals have long accorded deference to trial-court findings about the arm's-length nature of a transaction. See, *e.g.*, *Lardas* v. *Grcic*, 847 F.3d 561, 568 (7th Cir. 2017) (explaining that bankruptcy court's determination that a sale was conducted at arm's length was "reviewable only for clear error"), petition for cert. pending, No. 16-1508 (filed June 19, 2017); *D'Amato* v. *Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (holding that district court's determination that settlement was the product of arm's-length negotiations "was not clearly erroneous"); *In re O'Connor*, 153 F.3d 258, 261 (5th Cir. 1998) (holding that bankruptcy court's arm's-length determination about an option contract was not "clear error"); *Ford* v. *Allied Mut. Ins. Co.*, 72 F.3d 836, 840 (10th Cir. 1996) (describing a "major issue of fact as to whether" an individual "was in an arm's length relationship" with his insurer); *Allen* v. *Commissioner*, 925 F.2d 348, 352 (9th Cir. 1991) (concluding that "it was not clear error to find the three organizations were not at arm's length for purposes of the transaction in question") (citation and internal quotation marks omitted); *United States* v. *Seetapun*, 750 F.2d 601, 605 (7th Cir. 1984) (concluding that a husband and wife were "plainly not dealing at arm's length

in this matter, and the district court committed clear error in failing to recognize that fact"). Petitioner does not identify any contrary examples.

c. The "basic principles of institutional capacity" likewise "counsel in favor of deferential review." *McLane*, 137 S. Ct. at 1167. The fact-intensive determination that a transaction was conducted at arm's length turns in part on historical facts (the terms of the deal, the relationship between the parties, and so on) and in part on the credibility of the witnesses who testify as to their motives and reasoning. The resulting decision "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289 (1960). The court that hears the live testimony of the relevant witnesses is best positioned to make that decision. See, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1474 (2017) ("[T]he various cues that bear so heavily on the listener's understanding of and belief in what is said are lost on an appellate court later sifting through a paper record.") (citation and internal quotation marks omitted); *Miller*, 474 U.S. at 114 (noting that there are "compelling and familiar justifications" for applying deferential review when "the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor").

In addition, de novo appellate review would provide few "law-clarifying benefits" in this context. *Pierce*, 487 U.S. at 561. Although the Bankruptcy Code enumerates 20 categories of persons and entities that qualify as insiders, 11 U.S.C. 101(31), Congress did not attempt to define the full range of covered entities because "the term ['insider'] is not susceptible of precise

specification." House Report 314. Non-statutory insiders represent the residual category that Congress deemed incapable of comprehensive definition. As a result, the range of potential non-statutory insiders will vary significantly, and the determination whether a transaction was conducted at arm's length will "generally not [be] amenable to broad *per se* rules." *McLane*, 137 S. Ct. at 1168 (citation omitted). Rather, trial courts are likely to confront "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 561-562 (citation omitted). Searching appellate review of such case-specific decisions would add only modest value.

d. Other Bankruptcy Code provisions reinforce the conclusion that deferential review is appropriate. See *Pierce*, 487 U.S. at 558. As this case illustrates, an assertion that an individual is an insider under 11 U.S.C. 1129(a)(10) may often accompany an assertion that he voted to confirm a plan in bad faith, see 11 U.S.C. 1126(e), or that a plan was proposed in bad faith, see 11 U.S.C. 1129(a)(3). See J.A. 73-74. Petitioner acknowledges (Br. 51) that a trial court's bad-faith analysis involves an assessment of "individualized subjective factors" that is subject to deferential review. See *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012) (noting that bankruptcy courts have "considerable discretion in finding good faith") (citation omitted). Much of the same evidence that informs the court's determination whether a person voted his claim in good faith, consistent with his commercial interests, may also inform the determination whether a person acquired that claim at arm's length, consistent with his commercial interests. Trial courts equipped to distinguish between good-faith and bad-faith voting are similarly equipped

to distinguish between independent and biased decisionmaking. See *McLane*, 137 S. Ct. at 1163 (noting that trial courts' "considerable experience in making similar decisions in other contexts gives them the institutional advantage") (brackets, citation, and internal quotation marks omitted).

In addition to the provisions that restrict insiders' role in the plan-confirmation process, the Bankruptcy Code contains several independent safeguards against approval of plans that are substantially unfair to creditors. All plans must be proposed in good faith, must provide objecting creditors with at least the value that they would receive if the debtor were liquidated, and must be feasible. 11 U.S.C. 1129(a)(3), (7) and (11). In addition, cramdown plans must "not discriminate unfairly" and must be "fair and equitable," as further defined for a variety of scenarios, "with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. 1129(b)(1); see *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 643 (2012) (explaining that "[a] Chapter 11 plan confirmed over the objection of a class of secured claims must meet one of three requirements in order to be deemed fair and equitable") (internal quotation marks omitted). Those other prerequisites to plan confirmation mitigate petitioner's concern that deferential appellate review of a bankruptcy court's determination regarding a particular creditor's arm's-length status will result in "an unfair advantage" for debtors at the expense of creditors. Pet. Br. 55 (citation omitted).

C. The Court Of Appeals Articulated And Applied The Correct Standard Of Review In This Case

1. The court of appeals correctly explained that, when an appellate court reviews a trial court's determination concerning a creditor's insider status, it reviews the trial court's conclusions of law de novo and the trial court's findings of fact for clear error. Pet. App. 8a. In applying that approach, the court of appeals first reviewed the bankruptcy court's articulation of the criteria used to determine whether a particular creditor is a non-statutory insider. The court of appeals recognized that "[e]stablishing the definition of non-statutory insider status is * * * a purely legal inquiry" that an appellate court reviews "de novo." *Ibid.* The court further explained that an entity is a non-statutory insider if "(1) the closeness of [the creditor's] relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." *Id.* at 13a.

The court of appeals evidently viewed the bankruptcy court as having applied the proper legal test for determining non-statutory insider status, as it emphasized that it had "reviewed de novo the bankruptcy court's definition of non-statutory insider status." Pet. App. 15a n.13. The court of appeals then stated that it would next "analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review." *Ibid.* The court described the course of dealing among Rabkin, Bartlett, and MBP, see *id.* at 16a-18a, and concluded that "[t]hese facts do not leave us with a 'definite and firm conviction that a mistake has been committed,'" *id.* at 18a (citation omitted). The court's overall

approach was thus consistent with the principles described above, under which a trial court determination as to insider status may rest on distinct legal and factual components, and an appellate court should apply the standard of review that is appropriate for each aspect of the trial court's analysis.

To be sure, the court of appeals' opinion includes some imprecise language. The court stated, for example, that "[t]he bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous," Pet. App. 16a—a statement that elides the separate legal and factual components of the bankruptcy court's ultimate conclusion as to Rabkin's insider status. But the court of appeals elsewhere made clear that it was applying "a different standard of review" to the "two distinct issues in question," *i.e.*, de novo review to the bankruptcy court's articulation of the legal standard and clear-error review to the bankruptcy court's factual findings. *Id.* at 15a n.13.

2. Petitioner contends (Br. 26-28) that the court of appeals in fact deferred to the bankruptcy court's *legal* conclusions. That contention rests on petitioner's view that the bankruptcy court adopted a strict five-factor test for determining non-statutory insider status, rather than properly assessing whether MBP had sold its claim to Rabkin at arm's length.[4]

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[4] Petitioner elsewhere faults the bankruptcy court for failing to recite any specific test for determining whether the sale was conducted at arm's length. Pet. Br. 28-29 (citing Pet. App. 24a). But an arm's-length transaction is a familiar concept that this Court has often applied without further embellishment. See, *e.g.*, *Jones* v. *Harris Assocs. L. P.*, 559 U.S. 335, 346 (2010); *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939). The bankruptcy court did not commit legal error in failing to recite explicitly the definition discussed above. See pp. 17-18, *supra*.

If the bankruptcy court had articulated and applied the wrong test for determining whether a particular creditor is a non-statutory insider, that would have been a legal error, reviewable de novo. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960). But while the bankruptcy court did not find in so many words that Rabkin had purchased MBP's claim in an "arm's-length transaction," it cited an array of facts supporting that conclusion: that Rabkin did not control Bartlett, or vice versa; that Rabkin's and Bartlett's finances were not intertwined; that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class";[5] and that Rabkin had made "a speculative investment" with reasonable due diligence "under the circumstances." Pet. App. 66a-67a;

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[5] In the proceedings below, petitioner argued that MBP had assigned its claim to Rabkin in order "to artificially create an impaired consenting class," J.A. 74; see Pet. App. 62a, and that Rabkin's acceptance of the plan therefore should be disallowed under 11 U.S.C. 1126(e), which authorizes the court to "designate any entity whose acceptance or rejection of [a proposed] plan was not in good faith, or was not solicited or procured in good faith." The bankruptcy court rejected that contention. Pet. App. 67a. The court found that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class for purposes of cramdown" because Rabkin "was not required to sell his claim to" petitioner; because Rabkin had exercised diligence that "was sufficient under the circumstances"; and because "Ms. Bartlett did not ask Dr. Rabkin to vote in favor of the" plan. *Ibid.* Although the parties' dispute over bad faith primarily related to Section 1126(e), the court's analysis of the Section 1126(e) issue also supports its finding that the transaction at issue here was conducted at arm's length—*i.e.*, that Rabkin had purchased (and MBP had sold) the claim in good faith, consistent with his own commercial interests. See *id.* at 42a; see also *U.S. Med.*, 531 F.3d at 1277 n.4.

see J.A. 153-155. Taken together, those various findings are properly understood as an implicit determination that the sale was made at arm's length.

In any event, in determining whether the court of appeals misstated the legal principles that govern appellate review, the salient point is that the court of appeals *understood* the bankruptcy court to have found that an arm's-length sale occurred. The court of appeals did not believe that the bankruptcy court had adopted the strict five-factor test that petitioner perceives (Br. 26-27). Rather, it concluded that "[t]he [bankruptcy] court's failure to use the words 'arm's length transaction' is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider." Pet. App. 17a n.15; see *id.* at 14a (noting that a trial court "must conduct a fact-intensive analysis to determine if a creditor and debtor * * * negotiated at less than arm's length"). The court of appeals' articulation of the applicable standard of review followed logically from its understanding of the rationale on which the bankruptcy court had decided the case.

3. The dissenting judge below offered two basic criticisms of the majority's analysis. The dissenting judge stated that "[a]t no point does the bankruptcy court mention or refer to an 'arm's length transaction' at all, let alone provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers." Pet. App. 23a. The majority acknowledged the bankruptcy court's "failure to use the words 'arm's length transaction'" but found that omission "irrelevant," explaining that "[t]he court's entire explanation is a description of why the transaction was

conducted at arm's length." *Id.* at 17a n.15. The majority understood the term "arm's length transaction" to mean either a "transaction between two unrelated and unaffiliated parties" or a transaction between related parties that is "conducted as if the parties were strangers." *Id.* at 13a-14a n.11 (citation omitted). The dissenting judge did not dispute that, if the bankruptcy court had made an explicit finding that the sale of MBP's claim was conducted "as if the parties were strangers," *id.* at 14a n.11, that finding would be reviewable on appeal only for clear error. See p. 18, *supra* (questions concerning individual's motive or intent are factual rather than legal).

The dissenting judge also stated that "the only logical explanation for Rabkin's actions here" was that Rabkin "did a favor for a friend." Pet. App. 21a. The phrase "only logical explanation" suggests that, even if the bankruptcy court had made an explicit finding that the sale was conducted as though the parties were strangers, the dissenting judge would have rejected the finding as clearly erroneous. *Ibid.*; see *id.* at 19a ("The facts make it clear that this transaction was negotiated at less than arm's length."). The majority noted the dissent's view but concluded that "the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical." *Id.* at 18a n.16. Under the clear-error standard of appellate review, the majority's conclusion that the two explanations were "equally logical" required sustaining the bankruptcy court's determination that Rabkin was not a non-statutory insider.

Petitioner, like the dissenting judge below, identifies substantial grounds for doubting the bankruptcy court's factual finding that Rabkin acquired MBP's

claim for legitimate investment purposes, rather than as a means of benefiting a statutory insider with whom he had a close personal relationship. Pet. Br. 54; Pet. App. 19a-22a. But those arguments relate to the distinct question whether the bankruptcy court clearly erred in finding that Rabkin had purchased MBP's claim at arm's length. Whatever the answer to that question, the court of appeals was correct in holding that the bankruptcy court's resolution of the parties' factual dispute was subject to clear-error review on appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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